CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY

SUPPLEMENTARY TO AMES'S CASES IN EQUITY JURISDICTION
VOL. I

BY

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PREFATORY NOTE

THESE cases are intended as a supplement to Volume I of Ames's Cases in Equity Jurisdiction, and might well serve in a new edition for three additional sections of Chapter IV. They have been used during the past year as a substitute for Section V (Infringement of rights of monopoly), since the subject matter of that section is for the most part out of the field of the general practitioner and is of interest only to a highly specialized branch of the profession.

JUNE 10, 1916

A reprint has become necessary because of the exhaustion of the first edition which was not electrotyped. I have taken advantage of the opportunity to make some corrections and additions in the notes, for many of which I am indebted to Professor Zechariah Chafee, Jr.

NOVEMBER 14, 1919

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INJUNCTIONS AGAINST WRITING OR SPEAKING — DEFAMATION.

ELNET *v.* BELGRAVE.

IN CHANCERY, BEFORE JOHN DE SCARLE, M. R., LORD KEEPER, 1395 OR 1396.

[*Baildon, Select Cases in Chancery, no.* 108.]

To the Keeper of the Great Seal of our Lord the King,

BESEECHETH John de Elnet, Archdeacon of Leicester, that whereas Walter Barnake, clerk, Official of the said Archdeacon, had fixed a day to sit and do what belonged to his office in the church of S. Martin, in the town of Leicester, one John Belgrave the night before or early the same morning privily and maliciously caused to be placed in the said church, below where the said Official ought to sit, a bill written in text hand, alleging [?] that the said Official might well compare with the judges who condemned Susannah, giving unrighteous judgments, oppressing the innocent, and suffering the evil-doers, and also [comparing him] to a judge of the devil in iniquity, with many other blameworthy words, and further made censure generally on the said Official, of the Holy Church and of all those putting the said bill in reproof, to the slander and vilifying of the laws of Holy Church; the said John Belgrave openly and proudly defended that the said censures were published a long time before, knowing what he had done, and that he would fully avow it; whereby all evil-doers in those parts are so emboldened and comforted to do evil and to sustain their errors, and the said Archdeacon and his officers are so affrighted, not daring to do what belongs to their office, that the laws, privileges and liberties of Holy Church cannot, on account of so evil an example, be executed, maintained or performed; and through these ill-done riots it is like that the said John Belgrave and others, his adherents, will make an insurrection within a short time unless due remedy be made by the Court of our sovereign

Lord the King; May it please the said Keeper to grant a writ directed to the said John Belgrave to come before our said Lord the King in his Chancery on the quindene of S. Hilary next coming, under a certain pain, to answer to the articles aforesaid and to all other articles concerning the matter aforesaid, which shall then be alleged against him by the said Archdeacon. For God and in way of charity.[1]

IMPEACHMENT OF LORD CHIEF JUSTICE SCROGGS.

In Parliament, 1680–1681.

[8 *Howell's State Trials*, 198.]

Articles of Impeachment against Sir Wm. Scroggs, knt. Chief Justice of the court of King's-Bench, by the Commons, in this present Parliament assembled, in their own name, and in the name of all the Commons of England, of High-Treason, and other great Crimes and Misdemeanors.

III. That, whereas one Henry Carr had, for some time before, published every week a certain book, intitled, "The Weekly Pacquet of Advice from Rome, or, the History of Popery"; wherein the superstitions and cheats of the church of Rome, were from time to time exposed; he the said Sir William Scroggs, then Chief Justice of the court of King's-Bench, together with the other judges of the said court, before any legal conviction of the said Carr of any crime, did in the same Trinity Term, in a most illegal and arbitrary manner, make, and cause to be entered, a certain rule of that court against the printing of the said book, *in hæc verba;*

"Die Mercurii proxima post tres Septimanas Sanctae Trinitatis, Anno 32 Car. II. Regis. Ordinatum est quod Liber intitulat' 'The Weekly Pacquet of Advice from Rome, or, the History of Popery,' non ulterius imprimatur vel publicetur per aliquam personam quamcunque. *Per Cur'*"

And did cause the said Carr, and divers printers and other persons to be served with the same; which said rule and other proceedings were most apparently contrary to all justice, in condemning not only what had been written without hearing the parties, but also all that might for the future be written on that subject; a manifest countenancing of popery and discouragement of protestants, an open invasion upon the right of the subject, and an encroaching and assuming to themselves a legislative power and authority.[2]

[1] Baildon's translation.

[2] Only the article of impeachment relating to the order against the "Weekly Pacquet from Rome" is printed.

BURNETT *v.* CHETWOOD.

IN CHANCERY, BEFORE LORD PARKER, C., OCTOBER 12, 1720.

[2 *Merivale*, 441, *note*.]

PARKER, C. A bill brought by the Plaintiff as executor of *Burnett*, the author of *Archæologia sacra*, against the Defendant for an Injunction to stay the printing and publishing a translation of the said book, suggesting it to be an injury to the executor, in whom the property of the book was vested by 8 *An. c.* 19; it was insisted on for the Defendant, that a translation of a book was not within the intent of the act, which being intended to encourage learning by giving the advantage of the book to the author, could be intended only to restrain the mechanical art of printing, and that others should not pirate the copy and gain an advantage to themselves by reprinting it; but not to hinder a translation of the book into another language, which in some respects may be called a different book, and the translator may be said to be the author, in as much as some skill in language is requisite thereto, and not barely a mechanic art, as in the case of reprinting in the same language; that the translator dresses it up and clothes the sense in his own style and expressions, and at least puts it into a different form from the original, and *forma dat esse rei;* and therefore should rather seem to be within the encouragement than the prohibition of the act.

LORD CHANCELLOR said, that though a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act, yet this being a book which to his knowledge, (having read it in his study,) contained strange notions, intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt, the learned being better able to judge of it, he thought it proper to grant an injunction to the printing and publishing it in English; that he looks upon it, that this Court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality.

An injunction was granted.

HUGGONSON'S CASE.

IN CHANCERY, BEFORE LORD HARDWICKE, C., DECEMBER 3, 1742.

[2 *Atkyns*, 469.]

A MOTION against the printer of the *Champion*, and the printer of the *St. James's Evening Post*, that the former who is already in the *Fleet*,

may be committed close prisoner; and that the other, who is at large, may be committed to the *Fleet*, for publishing a libel against Mr. *Hall* and Mr. *Garden*, (executors of *John Roach*, Esq., late major of the garrison of *Fort St. George*, in the *East Indies*); and for reflecting likewise upon Governor *Mackray*, Governor *Pitt*, and others, taxing them with turning affidavit men, &c. in the cause now depending in this court, between Mrs. *Roach* and the executors; and insisting that the publishing such a paper is a high contempt of this court, for which they ought to be committed.

LORD CHANCELLOR,

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented; nor is there any thing of more pernicious consequence, than to prejudice the minds of the publick against persons concerned as parties in causes, before the cause is finally heard.

It has always been my opinion, as well as the opinion of those who have sate here before me, that such a proceeding ought to be discountenanced.

But, to be sure, Mr. Solicitor General has put it upon the right footing, that notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it: For whether it is a libel against the publick or private persons, the only method is to proceed at law.[1]

DU BOST *v.* BERESFORD.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J., DECEMBER 6, 1810.

[2 *Campbell*, 511.]

TRESPASS for cutting and destroying a picture of great value, which the plaintiff had publicly exhibited; *per quod* he had not only lost the picture, but the profits he would have derived from the exhibition.

Plea *not guilty*.

It appeared that the plaintiff is an artist of considerable eminence; but that the picture in question, intitled *La Belle et la Bête*, or "Beauty and the Beast," was a scandalous libel upon a gentleman of fashion and his lady, who was the sister of the defendant. It was exhibited in a house in *Pall-Mall* for money; and great crowds went daily to see it,

[1] The remainder of the report, which deals only with questions of fact, is omitted.

In Kitcat *v.* Sharp, 52 L. J. Ch. 134, the court enjoined a libel interfering with the course of justice in a pending cause. Coleman *v.* West Hartlepool R. Co., 8 W. R. 734. *Accord.*

Dailey *v.* Superior Court, 112 Cal. 94. *Contra. Cf.* Patterson *v.* Colorado, 205 U. S. 454, 462 (*semble*); Schenck *v.* United States, 249 U. S. 47, 51–52.

till the defendant one morning cut it in pieces. Some of the witnesses estimated it at several hundred pounds.

The plaintiff's counsel insisted on the one hand, that he was entitled to the full value of the picture, together with compensation for the loss of the exhibition; while it was contended on the other, that the exhibition was a public nuisance, which every one had a right to abate by destroying the picture.

LORD ELLENBOROUGH. The only plea upon the record being the general issue of *not guilty*, it is unnecessary to consider, whether the destruction of this picture might or might not have been justified. The material question is, as to the value to be set upon the article destroyed. If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the LORD CHANCELLOR, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it. The jury, therefore, in assessing the damages, must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts.

Verdict for the plaintiff. Damages 5*l.*

GEE *v.* PRITCHARD.

IN CHANCERY, BEFORE LORD ELDON, C., JULY 28, 1818.

[2 *Swanston*, 402.]

THE bill charged that *Pritchard* was proceeding to print and publish, or cause to be printed and published, the letters of the Plaintiff, or true copies or copy thereof, and extracts therefrom, and that he and the Defendant *Anderson* had caused public notice thereof to be given, by advertisement in the newspapers, and otherwise, and particularly in a newspaper called *The Morning Post*, on *Friday* the 9th of *July*, in the words following: "In the press, and speedily will be published, by *William Anderson*, bookseller, *Piccadilly*, 'The Adopted Son, or, Twenty Years at *Beddington*,' containing Memoirs of a Clergyman, written by himself, and interspersed with interesting correspondence"; and that *Anderson* was printing and about to publish the same, or some work in which the letters, or copies thereof, or extracts therefrom, were introduced.

The bill also charged, that the Plaintiff never consented or agreed that the letters, or any of them, or any extracts or extract therefrom, should be published; and, in answer to an alleged pretence of the Defendant *Pritchard*, that the letters were his private property, and that he was entitled to print and publish them, or to make such use of them

as he might think proper, charged, that the letters were wholly written and composed by the Plaintiff, and were not the property of *Pritchard*, but of the Plaintiff, and that *Pritchard* had not even a joint, or partial, or any property whatever therein, and that *Pritchard*, if he ever had any interest in the letters, had parted with the same, for that he some time since sent to the Plaintiff a parcel of letters and papers, accompanied by a letter from him, stating, that the parcel contained the original letters which the Plaintiff had so written to him (the parcel of letters being then in the Plaintiff's possession); but the Plaintiff charged, that *Pritchard*, before he sent to the Plaintiff the parcel of original letters, and without the consent of the Plaintiff, took, or caused to be taken, a copy thereof, from which copy so taken he intended to print and publish copies or extracts.

. . . . . .

The bill prayed, that the Defendants might be respectively restrained by injunction from printing or publishing the original letters, or any copies or copy of the original letters, so written by the Plaintiff, or any extracts or extract therefrom, and might be decreed to deliver up to the Plaintiff, or to destroy, the original copy of the letters so taken or made by the Defendant *Pritchard*, and all printed and other copies thereof, or of any extracts therefrom, which they might respectively have in their possession or power.

The Chancellor having granted an interlocutory injunction, the defendant moved to dissolve it.

Mr. *Hart*, Mr. *Wetherell*, and Mr. *Sidebottom*, in support of the motion.

This injunction cannot be supported, except on the general principle, that the writer of a letter is entitled at any time to restrain the publication, and to recover the possession from the person to whom it was addressed. No such principle has ever been recognized in the jurisprudence of this country, and is negatived by the only recent decision on this subject, Lord and Lady *Perceval* v. *Phipps* (2 Ves. & Beam. 19). In *Hudson's* Treatise on the Court of Star Chamber, (2 Collect. Jurid. 1) no trace is found of any interference of that tribunal, by injunction or otherwise, on the subject of letters, unless the publication was libellous.

The LORD CHANCELLOR.

It will not be necessary to trouble you with that view of the case. The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes; excepting, of course, such cases as belong to the protection of infants, where a dealing with an infant may amount to a crime — an exception arising from that peculiar jurisdiction of this Court.

Argument in support of the motion resumed.

An attempt will be made to sustain the injunction, on the ground that the publication of the letters will be painful to the feelings of the Plaintiff.

The LORD CHANCELLOR.

I will relieve you also from that argument. The question will be, whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the Court.[1]

[At the close of the argument] —

The LORD CHANCELLOR.

I am of opinion, that the Plaintiff has a sufficient property in the original letters to authorize an injunction, unless she has by some act deprived herself of it. Laying out of the case much of what Mr. *Wetherell* has urged with so much ingenuity, I say only that though a letter is a subject of property, capable of being much more largely dealt with, in communication, than books, as, by reading to others, repeating passages, &c., yet the Court has never been alarmed out of the practice of granting injunctions relative to letters to the extent to which it grants them in the case of books, because persons may assemble others, and read and recite to them: it is not deterred from giving that relief because it cannot give other relief more effectual.

In stating what Lord *Hardwicke* says on the subject, though I cannot at the moment refer to cases, I state that which, in cases, has been handed down as the law of the Court. In *Pope* v. *Curl*, Lord *Hardwicke* went out of his way to state what he thought the doctrine on the subject of letters. Though the letters of eminent men, no one can suppose that they were all meant for publication; there are many passages in *Swift's* letters which he would be unwilling to have published. Lord *Hardwicke* says: "Another objection has been made by the Defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver: possibly the property of the paper may belong to him, but this does not give a license to any person whatsoever to publish them to the world." If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds, "for, at most, the receiver has only a joint property with the writer." (2 Atk. 342.)

No one can read the case of *Thompson* v. *Stanhope* without seeing that this was understood at that time to be the doctrine of the Court. Publication was there advertised in *November*, and the application to the Court not made until *March*, and on that circumstance Lord *Apsley* proceeded in recommending the arrangement which he afterwards mentions: "The executors cannot be said to have given their consent, though his Lordship thought they would have done better if they had

[1] Only part of the statement of facts and part of the colloquy between court and counsel are here printed.

applied earlier, before the expense of printing was incurred." (Amb. 739, 740.) That is a strong part of the case. Those were letters of two classes, written by a father to his son; one class relating to the characters of individuals. The communication being made by letter is *prima facie* evidence, that that is all the communication which, on the subject of those characters, the writer intends to make. So of what relates to education: though they concern public characters, and a public subject — education, no one can maintain, that those discussions found in private letters gave to the person who received the letters a right to carry into public the opinions of the writer on those public characters, and the system of education. Lord *Apsley* therefore granted the injunction, observing, that the Defendant "did very ill in keeping copies of the characters, when Lord *Chesterfield* meant that they should be destroyed and forgotten." Lord *Apsley* also cites the case of Mr. *Forrester*,[1] which certainly does not apply to letters. I believe the parties came to a compromise.

The doctrine is thus laid down, following the principle of Lord *Hardwicke:* I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.

Such is my opinion; and it is not shaken by the case of Lord and Lady *Perceval* v. *Phipps*. (2 Ves. & Beam. 19.) I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters, and I think that it will be extremely difficult to say where that distinction is to be found between private letters of one nature, and private letters of another nature. For the purposes of public justice publicly administered, according to the established institutions of the country, the letters must always be produced; I do not say that of justice administered by private hands; nor do I say that there may not be a case, such as the Vice Chancellor thought the case before him, where the acts of the parties supply reasons for not interfering: but that differs most materially from this case. In *April* last, the Defendant having so much of property in these letters as belongs to the receiver, and of interest to them as possessor, thinks proper to return them to the person who has in them, as Lord *Hardwicke* says, a joint property, keeping copies of them without apprising

[1] "In the case of Mr. Forrester *v.* Waller, 13 June, 1741, an injunction for printing the Plaintiff's notes, gotten surreptitiously without his consent, was granted." 4 Burr. 2331. In Donaldson *v.* Beckett, 2 Bro. P. C. Ed. Toml. 129, is enumerated among other "injunctions for printing unpublished Mss. without license from the author, 13 June 1741. Forrester *v.* Waller, for Forrester's Reports." Id. 138. — Reporter's note.

her, and assigning such a reason as he assigns for the return. Now I say, that, if in the case before the Vice Chancellor, Lady *Perceval* had given to *Phipps* a right to publish her letters, this case is the converse of that; and that the Defendant, if he previously had it, has renounced the right of publication.

On these grounds the injunction must be continued.

Motion refused.[1]

BRANDRETH *v.* LANCE.

IN CHANCERY, NEW YORK, BEFORE REUBEN H. WALWORTH, C., JULY 16, 1839.

[8 *Paige*, 24.]

THE complainant was the proprietor and vender of a nostrum known by the name of "Brandreth's Vegetable Universal Pills." And, as the bill alleged, by advertising this medicine extensively in the public papers in the state of New-York and elsewhere, and thus giving publicity to it and its general efficacy in the cure of diseases, the complainant had derived and was still deriving therefrom a comfortable support for himself and his family. The complainant also alleged that for the purpose of vending his pills he had been in the habit of keeping various offices, and of employing many agents and clerks; that among others he had employed the defendant, Lance, but had been obliged to discharge him for improper conduct; that in consequence of being thus discharged Lance became very much enraged and vowed revenge, and threatened to destroy the complainant; and that he thereupon opened a rival establishment for the purpose of vending medicine or pills in the city of New-York. The complainant further charged in his bill, that a short time previous to the filing thereof he had been spoken to by the defendant Trust, and informed that Lance had applied to him to write the complainant's life, and that he was inclined to do so, but would relinquish the undertaking for a bonus of $50; that the complainant spurned the offer, and bade Trust not to presume to repeat such a proposition, and that shortly thereafter, and previous to the filing of the bill, the complainant received a printed sheet, enclosed to him in a letter, containing the title page and preface and two other pages of a work or pamphlet entitled "The Life, Exploits, Comical Adventures and Amorous Intrigues of Benjamin Brandling, M.D.V.P.L.V.S., a distinguished pill vender, written by himself; interspersed with racy descriptions of scenes of life in London and New-York;" which work,

[1] Granard *v.* Dunkin, 1 Ball & B. 207; Folsom *v.* Marsh, 2 Story, 100; Grigsby *v.* Breckinridge, 2 Bush, 480; Denis *v.* Leclerc, 1 Mart. (La.) 297; Woolsey *v.* Judd, 4 Duer, 379; Baker *v.* Libbie, 210 Mass. 599; Barrett *v.* Fish, 72 Vt. 18 (*semble*); King *v.* King, 25 Wyo. 275. *Accord.*

The doctrine was limited to the case of letters possessing some literary value in Wetmore *v.* Scovell, 3 Edw. Ch. 515; Hoyt *v.* McKenzie, 3 Barb. Ch. 320.

by the title page, purported to be printed at New-York, by D. M. Hodges, for the proprietors, and to be had of all the booksellers. The residue of this first sheet of the work, which was set out at length in the bill, contained a ludicrous preface in which the complainant was represented as avowing his object in raking up and publishing all the vices and follies of his youth, to be for the double purpose of amusing himself and as a warning to others to avoid them. And the table of contents represented him as . . . having passed through the various and successive grades of sailor, confectioner, painter, brass founder, pedlar, jeweller, bagman to a pill vender, money broker, author, poet, and dramatist; until he had risen to the rank of a wholesale manufacturer of that rare medicine, upon which the smiles of fortune had been so freely bestowed.[1]

He therefore prayed for a perpetual injunction restraining the defendants from printing or publishing such book or pamphlet, or the contents thereof, or any part thereof; and that they might be decreed to deliver up the manuscript of the work, and all and every copy thereof, or of any part of the same printed by them, or either of them, to be cancelled and destroyed; and for such further or other relief as he might be entitled to in the premises. To this bill the defendants, Lance and Hodges put in separate demurrers. . . .

THE CHANCELLOR. It is very evident that this court cannot assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of a free government. (2 *R. S.* 737, § 1, *and Revisers' Note.*) This bill presents the simple case of an application to the court of chancery to restrain the publication of a pamphlet which purports to be a literary work, undoubtedly a tale of fiction, on the ground that it is intended as a libel upon the complainant. The court of star chamber in England once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages. (*Hudson's Star Chamber*, 2 *Collect. Jurid.* 224.) And, as an incident to such a jurisdiction, that court was undoubtedly in the habit of restraining the publication of such libels by injunction. Since that court was abolished, however, I believe there is but one case upon record in which any court, either in this country or in England, has attempted, by an injunction or order of the court, to prohibit or restrain the publication of a libel, as such, in anticipation. In the case to which I allude the notorious Scroggs, chief justice of the court of king's bench, and his associates, decided that they might be safely entrusted with the power of prohibiting and suppressing such publications as they might deem to be libellous. They accordingly made an order of the court prohibiting any person from

[1] Parts of the statement of facts are omitted.

printing or publishing a periodical, entitled "The Weekly Packet of Advice from Rome, or the History of Popery." The house of commons, however, considered this extraordinary exercise of power on the part of Scroggs as a proper subject of impeachment. (8 *Howell's State Trials*, 198.) And I believe no judge or chancellor from that time to the present has attempted to follow that precedent. There is, indeed, in the reported case of *Du Bost* v. *Beresford*, (2 *Camp. Rep.* 511,) which was an action of trespass against the defendant for destroying a libellous picture, a most extraordinary declaration of Lord Ellenborough, that the Lord Chancellor, upon an application to him, would have granted an injunction against the exhibition of the libellous painting. It is said, however, in a note to *Horne's case*, in the state trials, that this declaration of Lord Ellenborough, in relation to the power of the Lord Chancellor to restrain the publication of a libel by injunction, excited great astonishment in the minds of all the practitioners in the courts of equity. (20 *Howell's St. Tr.* 799.) It must unquestionably be considered as a hasty declaration, made without reflection during the progress of a trial at *nisi prius;* and as such it is not entitled to any weight whatever.

The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property. Upon this principle alone Lord Eldon placed his decision, in the case of *Gee* v. *Pritchard*, (2 *Swanst. Rep.* 403,) continuing the injunction which restrained the defendant from publishing copies of certain letters written to him by the complainant. But it may, perhaps, be doubted whether his lordship in that case did not, to some extent, endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when in fact the object of the complainant's bill was not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence, as a matter of feeling only. His decision in that case has, however, as I see, received the unqualified approbation of the learned American commentator on equity jurisprudence. (See 2 *Story's Eq.* 222, § 948.)

In this case the complainant does not claim the exercise of the extraordinary jurisdiction of this court on the ground of any violation of the rights of literary property, or because a work is improperly attributed to him which will be likely to injure his reputation as an author, or even as a manufacturer of pills. For although his counsel insist that it must necessarily have the effect to injure the sale of his pills, he has not alleged in his bill that he even believes it will have any such effect. And in the absence of such an allegation, I am, as a matter of opinion, inclined to the belief that with that class of persons who would be likely to buy and take his "universal pills," as a general remedy for any and every disease to which the human body is subject, the supposition that he was the author of the publication in question, and was also the extraordinary personage which this table of the contents of the work indicates, would

be very likely to induce them to purchase and use his medicine the more readily.

As the publication of the work, therefore, which is sought to be restrained, cannot be considered as an invasion of the rights either of literary or medical property, although it is unquestionably intended as a gross libel upon the complainant personally, this court has no jurisdiction or authority to interfere for his protection. And if the defendants persist in their intention of giving this libellous production to the public, he must seek his remedy by a civil suit in a court of law; or by instituting a criminal prosecution, to the end that the libellers, upon conviction, may receive their appropriate punishment, in the penitentiary or otherwise.

The demurrers must be allowed, and the complainant's bill dismissed, as to these defendants, with costs.[1]

DIXON *v.* HOLDEN.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., FEBRUARY 24, 1869.

[7 *Equity*, 488.]

SIR R. MALINS, V. C., after fully stating the circumstances set forth in the bill, and the correspondence between the parties, continued:[2] The Defendants have no right to suggest, as they do by the notice they threaten to publish, that the Plaintiff was a partner in a bankrupt firm. It is sworn, and I am satisfied it is correctly sworn, that the present firm of *W. Dixon & Co.* has nothing to do with the firm of *Dixon Brothers*, which was bankrupt; yet the publication intended to be circulated by the Defendants states, not only that he was a member of that firm, but that he has concealed the fact from the creditors, and has thereby defrauded them of the contributions which, as partner of that firm, he would be bound to make, and which contributions, if made, would have resulted in payment of the creditors in full. When remonstrated with in a very proper letter written by the solicitor, the Defendants, instead of apologizing to Mr. *Dixon* for the grievous offence they had been guilty of, actually repeat the offence in a more aggravated form, saying that they will bring this gentleman to the

[1] Balliet *v.* Cassidy, 104 Fed. 704; Vassar College *v.* Loose-Wiles Biscuit Co., 197 Fed. 982; Willis *v.* O'Connell, 231 Fed. 1004; Donaldson *v.* Wright, 7 App. D. C. 45 (*semble*); Christian Hospital *v.* People, 223 Ill. 244; Midland Press *v.* Compton, 204 Ill. App. 216; Life Ass'n *v.* Boogher, 3 Mo. App. 173; Howell *v.* Bee Publishing Co. 100 Neb. 39 (*semble*); Mayer *v.* Journeymen Stonecutters' Ass'n, 47 N. J. Eq. 519; Marlin Fire Arms Co. *v.* Shields, 171 N. Y. 384; New York Juvenile Guardian Society *v.* Roosevelt, 7 Daly, 188; De Wick *v.* Dobson, 18 App. Div. 399; Owen *v.* Partridge, 40 Misc. 415; Dopp *v.* Doll, 13 Weekly Law Bull. (Ohio) 335; Judson *v.* Zurhorst, 30 Ohio Cir. Ct. R. 9. *Accord.*

Itzkovitch *v.* Whitaker, 115 La. 479, 117 La. 708; Schulman *v.* Whitaker, 117 La. 704. *Contra.*

[2] The statement of facts and the arguments of counsel are omitted.

bar of justice, and will prove that he was a member of the bankrupt firm.

I am told that a Court of Equity has no jurisdiction in such a case as this, though it is admitted it has jurisdiction where property is likely to be affected. What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. But here it is distinctly sworn to, and cannot be denied, that the effect of this will be seriously damaging to the Plaintiff's business of a merchant.

Now the business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property.

In this case I go on general principle, and I am fortified by authority. General principle is in favor of it, but authority is not wanting.

It is contended that Lord *Cottenham* has laid it down in *Fleming* v. *Newton*, 1 H. L. C. 363, that this Court has no jurisdiction to restrain the publication of a document like this. When I look at the report, I find that Lord *Cottenham* abstains from laying down a rule in that case, but expresses a hope that the Scotch Judges would take care to exercise the jurisdiction of the Court with discretion and consistency.

But there are cases in this Court going to the point. I had occasion to consider the subject very fully in the case of *Springhead Spinning Company* v. *Riley*, Law Rep. 6 Eq. 551. That was an injury to property, and on that ground I overruled the demurrer. I then considered all the authorities on the subject as to where this Court would grant, or would not grant, an injunction to prevent a publication which had the effect of injuring property. The case of *Routh* v. *Webster*, 10 Beav. 561, is an authority going the whole length of what is asked here. In that case a joint stock company was established having for its only object the carrying passengers by steamboat and omnibus at a cheap rate. The Defendants, the provisional directors, had published prospectuses in which the name of the Plaintiff was used without his authority as a trustee of the company. They also paid moneys into the bankers of the company to the Plaintiff's account as trustee. The Plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the directors, and moved for an injunction to restrain them from using his name in connection with the company. Lord *Langdale* granted the injunction, and observed that it would be a warning to the Defendants not to use the names of other persons without their authority. The Defendants were not to be allowed

to use the names of any persons they pleased, representing them as responsible in their speculations and involving them in all sorts of liabilities.[1]

The next case is that of *Clark* v. *Freeman*, 11 Beav. 112, in which Sir *James Clark*, the well-known physician, came to the Court for an injunction, complaining of his reputation having been injured because of the Defendant *Freeman* having advertised a pill as being from the Plaintiff's prescription, and Lord *Langdale* refused the injunction only because he did not think it likely that such a thing could possibly prove an injury to the reputation of a man in the position of Sir *James Clark*. I took the opportunity in the case of *Springhead Cotton Spinning Company* v. *Riley*, Law Rep. 6 Eq. 551, of stating what Lord *Cairns* said of the case of *Clark* v. *Freeman*, when giving judgment in *Maxwell* v. *Hogg*, Law Rep. 2 Ch. 307, 310. That was a case to restrain the publication of a magazine, and Lord *Cairns* said: "It always appeared to me that *Clark* v. *Freeman* might have been decided in favor of the Plaintiff on the ground that he had property in his own name." I have already said that in my opinion the Court has jurisdiction in such a case, and has exercised it repeatedly to prevent such a state of things.

My observations in the *Springhead Spinning Company* are entirely applicable, and inasmuch as I am clearly of opinion that the injunction in this was rightly granted, so I am now clear that it is my duty to make that injunction perpetual. The subsequent conduct of the Defendants has not mitigated in any way their offence. They have not come here in a tone of apology for this most improper and vexatious conduct, but, on the contrary, they have appeared rather to justify themselves than to apologize, and it has greatly aggravated the offence. In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself. On these grounds I have no hesitation as to the decision I ought to come to, and I have no doubt whatever as to the jurisdiction, or as to the conduct of the Defendants. That being so, the injunction will be made perpetual, with costs against both the Defendants.

[1] In Webster *v.* Webster [1916] 1 K. B. 714, a husband sought an injunction against a wrongful pledge of his credit by his wife. The injunction was denied chiefly on the ground that the Married Woman's Property Act of 1882 did not permit actions upon tort between husband and wife and hence such a case was not cognizable in equity.

BOSTON DIATITE CO. *v.* FLORENCE MANUFACTURING CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1873.

[114 *Massachusetts Reports*, 69.]

BILL IN EQUITY against the Florence Manufacturing Company, Isaac S. Parsons, George A. Burr, and George A. Scott, alleging that the plaintiff corporation was and for three years had been engaged in the manufacture of sundry articles, among which were toilet mirrors, made from a composition, invented and patented by one Merrick, which was capable of being moulded by heat and pressure into various shapes, and that they had applied to this material the trade-mark name "Diatite," by which it was generally known; that the defendant corporation was engaged in the manufacture of toilet mirrors from another material capable of being moulded and pressed, upon which there were no letters patent; that the defendant Parsons was the president, the defendant Burr the treasurer, and the defendant Scott the agent of the defendant corporation; that Parsons, Burr, and Scott, acting as such officers and in the name of the corporation, falsely, fraudulently, and maliciously, and for the purpose of injuring the plaintiff and diverting its trade, represented to the plaintiff's customers that the articles manufactured by the plaintiff under its letters patent were manufactured in infringement of letters patent owned by the defendant corporation, and that the defendant corporation was prosecuting a suit against the plaintiff corporation for such infringement. The bill then set forth specific instances in which persons, in the bill named, who intended to make purchases of the plaintiff, had been deterred therefrom by oral and written representations, of the purport above set forth, made to them by the defendants, and had been induced to purchase of the defendant corporation.

The bill prayed that the defendants might be enjoined from making such representations, and that the defendant corporation might be decreed to account for the profits of its sales made by reason of such false representations.

The defendants demurred, because the plaintiff had not stated a case which entitled it to the relief prayed for.

GRAY, C. J. The jurisdiction of a Court of Chancery does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract. *Huggonson's case*, 2 Atk. 469, 488. *Gee* v. *Pritchard*, 2 Swanst. 402, 413. *Seeley* v. *Fisher*, 11 Sim. 581, 583. *Fleming* v. *Newton*, 1 H. L. Cas. 363, 371, 376. *Emperor of Austria* v. *Day*, 3 De G., F. & J. 217, 238–241. *Mulkern* v. *Ward*, L. R. 13 Eq. 619. The opinions of Vice-Chancellor Malins in *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551, in *Dixon* v. *Holden*, L. R.

7 Eq. 488, and in *Rollins* v. *Hinks*, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported.

The jurisdiction to restrain the use of a name or a trade-mark, or the publication of letters rests upon the ground of the plaintiff's property in his name, trade-mark, or letters, and of the defendant's unlawful use thereof. *Routh* v. *Webster*, 10 Beav. 561. *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 De G., J. & S. 137, and 11 H. L. Cas. 523. *Maxwell* v. *Hogg*, L. R. 2 Ch. 307, 310, 313. *Gee* v. *Pritchard*, 2 Swanst. 402.

The present bill alleges no trust or contract between the parties, and no use by the defendants of the plaintiff's name; but only that the defendants made false and fraudulent representations, oral and written, that the articles manufactured by the plaintiff were infringements of letters patent of the defendant corporation, and that the plaintiff had been sued by the defendant corporation therefor; and that the defendants further threatened divers persons with suits for selling the plaintiff's goods, upon the false and fraudulent pretence that they infringed upon the patent of the defendant corporation. If the plaintiff has any remedy, it is by action at law. *Barley* v. *Walford*, 9 Q. B. 197. *Wren* v. *Weild*, L. R. 4 Q. B. 730.

Demurrer sustained and bill dismissed.[1]

[1] Hammersmith Skating Rink Co. *v.* Dublin Skating Rink Co., 10 Ir. R. Eq. 235; Chase *v.* Tuttle, 27 Fed. 110 (*semble*); Kidd *v.* Horry, 28 Fed. 773; Baltimore Car-Wheel Co. *v.* Bemis, 29 Fed. 95; Welsbach Light Co. *v.* American Incandescent Light Co., 98 Fed. 613; Hobbs Mfg. Co. *v.* Gooding, 113 Fed. 615; Warren Featherbone Co. *v.* Landauer, 151 Fed. 130; Whitehead *v.* Kitson, 119 Mass. 484; Consumers' Gas Co. *v.* Kansas City Gas Light Co., 100 Mo. 501; Mauger *v.* Dick, 55 How. Pr. 132; Cohen *v.* United Garment Workers, 35 Misc. 748. *Accord.*

Croft *v.* Richardson, 59 How. Pr. 356. *Contra.*

Sending out circulars charging infringement and threatening purchasers from plaintiff with legal proceedings was enjoined, unless defendant would undertake to proceed at once to try the validity of the patent, in Rollins *v.* Hinks, 13 Eq. 355; Axmann *v.* Lund, 18 Eq. 330.

Injunctions have been allowed where such circulars were sent out with no intention of suing for the alleged infringements or in pure malice. Celluloid Mfg. Co. *v.* Goodyear Dental Co., 13 Blatchf. 375 (*semble*); Emack *v.* Kane, 34 Fed. 46; Kelley *v.* Ypsilanti Mfg. Co., 44 Fed. 19 (*semble*); Lewin *v.* Welsbach Light Co., 81 Fed. 904; Farquhar Co. *v.* National Harrow Co. (C. C. A.), 102 Fed. 714; Adriance Platt & Co. *v.* National Harrow Co. (C. C. A.), 121 Fed. 827, 98 Fed. 118; Dittgen *v.* Racine Paper Co., 164 Fed. 85; Electric Renovator Co. *v.* Vacuum Cleaner Co., 189 Fed. 754; Atlas Underwear Co. *v.* Cooper Underwear Co., 210 Fed. 347; Bell & Co. *v.* Singer Mfg. Co., 65 Ga. 452 (*semble*).

PRUDENTIAL ASSURANCE CO. *v.* KNOTT.

IN CHANCERY, BEFORE LORD CAIRNS, C., AND SIR W. M. JAMES AND SIR G. MELLISH, L. JJ., JANUARY 20, 1875.

[10 *Chancery Appeals*, 142.]

THE Plaintiffs in this case were a life assurance company carrying on business in *London*, and having an income of above £450,000 a year. The Defendant had lately published a pamphlet on Life Assurance Companies, in which he gave statistics and calculations as to the principal assurance offices, their incomes, rates of premium, expenses of collection, and ratio of assets to liabilities. He commented on the state of several of the companies, amongst which were the Plaintiffs. The Plaintiffs thereupon filed a bill against the Defendant, charging that the effect of certain specified portions of the pamphlet and of the erroneous statements in it as to the rates of premium charged by the company was to represent the company as being managed with reckless extravagance, and as being in a state of insolvency and unable to fulfil its engagements; that that representation was utterly untrue, and that the company's affairs were managed without extravagance; and that the company had been for many years past, and was still, in an exceedingly prosperous and thriving condition, abundantly solvent, and earning large profits. The bill further charged that the continued publication of the pamphlet containing the passages and statements in the bill complained of would be very injurious to the company's credit and reputation, and could not fail greatly to damage the company's business and to diminish its profits derived from it. And the bill accordingly prayed that the publication of the pamphlet might be restrained, and for consequent relief.

The Vice-Chancellor *Hall* refused to grant an injunction, and the Plaintiffs now, by way of appeal, moved for an injunction.

Mr. *Higgins*, Q. C., and Mr. *Phear*, (Mr. *Dickinson*, Q. C., with them,) in support of the appeal:

The publication of this pamphlet is a great wrong to the company, and is calculated to injure the company by deterring customers from insuring.

[THE LORD JUSTICE MELLISH: Will not this very application give greater publicity to the libel? If you are injured, bring your action.]

An action would be an altogether inadequate remedy, as the damages could not be assessed; and if this Court cannot interfere, the plaintiffs have practically no remedy. This Court will always interfere to protect property. *Gee* v. *Pritchard*, 2 Sw. 402, 413, and the good will of a business is a very valuable property. The Court clearly has jurisdiction. *Dixon* v. *Holden*, Law Rep. 7 Eq. 488. Whenever the property of a company is wronged by a libel this Court can interfere. *Clark* v. *Freeman*, 11 Beav. 112. *Mulkern* v. *Ward*, Law Rep. 13 Eq. 619. *Martin* v. *Wright*, 6 Sim. 297, has no bearing on this case.

[*Emperor of Austria* v. *Day*, 3 D. F. & J. 217, was also referred to.]

Mr. *Morgan*, Q. C., and Mr. *Ince*, for the Defendant, were not called upon.

LORD CAIRNS, L. C.:

I am of opinion that there is no ground whatever for the interference of the Court in this case. The Court is asked by an insurance company to grant an injunction to restrain the continued publication of a pamphlet which comments upon the statistical returns of various insurance companies with regard to the comparative expenses of their establishments as compared with their liabilities; and it is said that this pamphlet in those comments draws unfavorable conclusions with regard to the company which are Plaintiffs here, and that the expressions in the pamphlet will be injurious to this company in their trade and business. Now, the comments and expressions in this pamphlet either do amount to a libel upon the company, or do not. If they do not amount to a libel, and are therefore innocuous and justifiable in the eye of a Court of Common Law, I am at a loss to understand upon what principle the Court of Chancery could possibly interfere as a *censor morum* or critic to restrain the publication of statements or expressions which would be held justifiable in a Court of Common Law. If, on the other hand, these comments do amount to a libel, then, as I have always understood, it is clearly settled that the Court of Chancery has no jurisdiction to restrain the publication merely because it is a libel. There are publications which the Court of Chancery will restrain, and those publications, as to which there is a foundation for the jurisdiction of the Court of Chancery to restrain them, will not be restrained the less because they happen also to be libellous.

But apart from the suggestion that the publication here is a libel, I do not observe in the bill any statement or foundation for the jurisdiction of the Court to restrain. I repeat, if the observations are not libellous, they are lawful, and ought not to be restrained; if they are libellous, it is only because they are libellous that the Court of Chancery is asked to restrain them.

It is attempted to give a color to the application by saying that these are libellous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the good will of the company, is property; that the company in its trade will be injured, and that, therefore, the interference of the Court is asked for the protection of property. But with regard to nine out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations, which have an effect upon their character and upon their trade or business, or their character as connected with trade or business; but no case can be produced in which, in those circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances

of the refusal to exercise jurisdiction. There are the observations of Lord *Eldon* in *Gee* v. *Pritchard*, 2 Sw. 402, 413, the observations of Lord *Campbell* in the case of the *Emperor of Austria* v. *Day*, 3 D. F. & J. 217; there is the dictum of Lord *Langdale* in the case of *Clark* v. *Freeman*, 11 Beav. 112, which stands irrespective of any comments which may be made upon the decision of that particular case; there is the observation of the late Vice-Chancellor of *England* in *Martin* v. *Wright*, 6 Sim. 297; and there are the observations of the late Vice-Chancellor *Wickens* in *Mulkern* v. *Ward*, Law Rep. 13 Eq. 619. Over and above those, there is the decision of the House of Lords in *Fleming* v. *Newton*, 1 H. L. C. 363, and it is clear to my mind, from reading the opinion of Lord *Cottenham*, whose was the only opinion pronounced in that case, that the whole of it proceeds on one footing. He considered that the case being Scotch, some nicety of Scotch law might be made to appear in the courts of *Scotland* which would entitle them to interfere with the publication complained of in that case, but that unless some such feature of Scotch law could be shown, no such interference could, upon the general principles of English law, be permitted.[1]

Now, the only shadow of authority the other way is in the case of *Dixon* v. *Holden*, Law Rep. 7 Eq. 488, decided by Vice-Chancellor *Malins* in the year 1869. I say nothing about the decision in that particular case, and I do not mean to say that the decision is not capable of being maintained. It professes to proceed mainly upon a case of *Routh* v. *Webster*, 10 Beav. 561, because I observe that the Vice-Chancellor says (Law Rep. 7 Eq. 493): "The case of *Routh* v. *Webster*, is an authority going the whole length of what is asked here. In that case a joint stock company was established, having for its only object the carrying passengers by steamboat and omnibus at a cheap rate. The Defendants, the provisional directors, had published prospectuses, in which the name of the Plaintiff was used, without his authority, as a trustee of the company. They also paid moneys into the bankers of the company to the Plaintiff's account, as trustee." That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the Plaintiff might have been placed, especially at the time when that case was decided, looking at what was supposed then to be the state of the law as to such undertakings, are obvious; and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name. It was upon the authority of that case that the case of *Dixon* v. *Holden* was professed to be decided;

[1] The dictum of Lord Cottenham referred to reads: "I cannot . . . avoid expressing an earnest hope that, if this question should arise . . . it may be considered how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries under the 55 Geo. 3, cap. 42 [Fox's Libel Act] or indeed with the liberty of the press. That act appoints a jury as the proper tribunal for trial of injuries to the person by libel and defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to the publication of libels." Fleming *v.* Newton, 1 H. L. Cas. 363, 379. — Ed.

but the Vice-Chancellor went further, and said this (Law Rep. 7 Eq. 492): "The business of a merchant is about the most valuable kind of property that he can well have. Here it is the source of his fortune, and therefore to be injured in his business is to be injured in his property. But I go further, and say, if it had only injured his reputation, it is within the jurisdiction of this Court to stop the publication of a libel of this description, which goes to destroy his property or his reputation, which is his property, and, if possible, more valuable than other property. In this case I go on general principle, and I am fortified by authority. General principle is in favor of it, but authority is not wanting." And further on, the Vice-Chancellor says (Law Rep. 7 Eq. 494): "In the decision I arrive at, I beg to be understood as laying down, that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation." Now, in those opinions the Vice-Chancellor conceived that he was fortified by authority. The authorities cited are, the case of *Fleming* v. *Newton*, 1 H. L. C. 363, which appears to me to be an authority exactly to the contrary; the case of *Routh* v. *Webster*, 10 Beav. 561, which was an authority for preventing the improper use of a man's name against his will; the case of *Clark* v. *Freeman*, 11 Beav. 112, where the injunction was refused, and where Lord *Langdale* said the Court would not interfere to prevent a libel; and the only other case mentioned, *Springhead Spinning Company* v. *Riley*, Law Rep. 6 Eq. 551, decided by the Vice-Chancellor himself, upon which of course the learned Judge must be taken to have expressed the same opinion as he expressed in the case of *Dixon* v. *Holden*, Law Rep. 7 Eq. 488.

I am unable to accede to these general propositions. They appear to me to be at variance with the settled practice and principles of this Court, and I cannot accept them as an authority for the present application. I think that this appeal must be refused with costs.

SIR W. M. JAMES, L. J.: —

I am of the same opinion; and I think it is right, this appeal being brought, to express my entire concurrence in the views just stated by the Lord Chancellor. I think that the Vice-Chancellor *Malins*, in that case of *Dixon* v. *Holden*, was, by his desire to do what was right, led to exaggerate the jurisdiction of this Court in a manner for which there was no authority in any reported case, and no foundation in principle. I think it right to say that I hold without doubt that the statement of the law in that case is not correct.

SIR G. MELLISH, L. J.: —

I also am entirely of the same opinion.[1]

[1] Martin *v.* Wright, 6 Sim. 297 (*semble*); Seeley *v.* Fisher, 11 Sim. 581 (*semble*); Edison *v.* Thomas A. Edison, Jr. Chemical Co., 128 Fed. 957; Montgomery Ward &

MARLIN FIRE ARMS CO. *v.* SHIELDS.

COURT OF APPEALS, NEW YORK, JUNE, 1902.

[171 *New York Reports*, 384.]

PARKER, C. J. The plaintiff corporation, which manufactures Marlin repeating rifles, brought this action to perpetually restrain defendant, the proprietor of a magazine called "Recreation," from publishing "any article or statement in any form or under any guise falsely attacking, misrepresenting or depreciating plaintiff's said rifle or its accuracy, effectiveness, merit or value."

Defendant demurred to the complaint, and the question presented on this review is whether it states a cause of action. The following is as brief a synopsis of it as will suffice to present fully the question before us:

Plaintiff is engaged in the manufacture and sale of the Marlin repeating rifles, which have become well known as a distinct model throughout the United States and elsewhere, and for some time it advertised the rifles in defendant's magazine. Defendant having advanced his rates, plaintiff withdrew the advertisement, whereupon defendant published letters, purporting to be from correspondents, reflecting on the

Co. *v.* Dealers' Assn., 150 Fed. 413 (*semble*); Citizens' Light Co. *v.* Montgomery Light Co., 171 Fed. 553; American Malting Co. *v.* Keitel (C. C. A.), 209 Fed. 351; Singer Mfg. Co. *v.* Domestic Sewing Machine Co., 49 Ga. 70; Chicago City R. Co. *v.* General Electric Co., 74 Ill. App. 465; Allegretti Chocolate Co. *v.* Rubel, 83 Ill. App. 558; Raymond *v.* Russell, 143 Mass. 295; Finnish Temperance Society *v.* Publishing Co., 219 Mass. 28; Life Ass'n *v.* Boogher, 3 Mo. App. 173; Iverson *v.* Dilno, 44 Mont. 270; Richter *v.* Journeyman Tailors' Union, 25 Weekly Law Bull. (Ohio) 189; Baltimore Life Ins. Co. *v.* Gleisner, 202 Pa. St. 386; Mitchell *v.* Grand Lodge (Tex. Civ. App.), 121 S. W. 178. *Accord.*

After a jury has found the matter libellous, the court may enjoin repetition. Saxby *v.* Easterbrook, 3 C. P. D. 339, 341; Halsey *v.* Brotherhood, 15 Ch. D. 514, 19 Ch. D. 386; Flint *v.* Hutchinson Smoke Burner Co., 110 Mo. 492; Wolf *v.* Harris, 267 Mo. 405 (*semble*).

Under the present English practice, an interlocutory injunction will not be allowed where the question of libel has not been tried by a jury unless the case is very clear. Liverpool Household Ass'n *v.* Smith, 37 Ch. D. 170; Bonnard *v.* Perryman, [1891] 2 Ch. 269. If the court is clearly satisfied there is a libel, it may grant an interlocutory injunction. Collard *v.* Marshall, [1892] 1 Ch. 571. See also FitzGerald *v.* Clancy, [1902] 2 I. R. 207, 212.

Prudential Ass. Co. *v.* Knott is not followed in England to-day. The change is usually attributed to extension of the power of the court through the Common Law Procedure Act (1854), § 79, and Supreme Court of Judicature Act (1873), § 25, 8. Beddow *v.* Beddow, 9 Ch. D. 89; Quartz Hill Consolidated Co. *v.* Beall, 20 Ch. D. 501. See James *v.* James, 13 Eq. 421; Thorley's Cattle Food Co. *v.* Massam, 14 Ch. D. 763; Thomas *v.* Williams, 14 Ch. D. 864; Herman Loog *v.* Bean, 26 Ch. D. 306; Hayward *v.* Hayward, 34 Ch. D. 198; Walter *v.* Ashton, [1902] 2 Ch. 282. The power to restrain libels is not confined to cases where business or credit is affected. Monson *v.* Tussaud, [1894] 1 Q. B. 671 (public exhibition of wax portrait model of plaintiff in a "chamber of horrors"). As to Australia, see Waters *v.* Turri, 3 Arg. L. R. (Victoria), C. N. 67; Sander *v.* United Horse-Shoe Co. 12 N. S. W. L. R. Eq. 224.

rifle, such publications taking place, one in March and two in October, 1899, and one in September and another in November, 1900. These letters were not in fact written by correspondents, but were sham letters, written and published by defendant in furtherance of a design to force plaintiff to advertise with him, or, failing in that, to gratify his malice.[1]

This brings us to the real question of the case, whether an unjust and malicious criticism of a manufactured article, for which the manufacturer has no remedy at law because of his inability to prove special damage, is the subject of equitable cognizance.

The constitutional guaranty of freedom of speech and press, which in terms provides that "every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press" (State Constitution, art. I, § 8), has for its only limitations the law of slander and libel. Hitherto freedom of speech and of the press could only be interfered with where the speaker or writer offended against the criminal law or where the words amounted to a slander or libel of a person or corporation or their property, and the guaranteed right of trial by jury entitled the parties accused of slander or libel to have twelve men pass upon the question of their liability to respond in damages therefor and to measure such damages. But the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance, in so far as a plaintiff's property rights might seem to require, and, in case of the violation of the provisions of such a decree, the usual course and practice of equity would necessarily be invoked, which would authorize the court to determine whether such published articles were contrary to the prohibitions of the decree, and, if so found, punishment as for a contempt might follow. Thus a party could be punished for publishing an article which was not libellous and that too without a trial by jury.

While we have pointed out in general terms the limitations of the courts in dealing with slander and libel, we shall confine ourselves on this review to a consideration of those authorities which bear directly upon the question whether equity, which creates neither rights not liabilities, has heretofore assumed jurisdiction to restrain the publication of criticisms unjustly affecting the merits of articles of property belonging to a plaintiff when such publication will not support an action at law, for, if such precedent be not already established by the courts of this state, in our view it ought not to be.

It was long ago held in this state that a Court of Chancery has no jurisdiction to restrain the publication of a libel, by injunction, upon a

[1] Only a portion of the statement of facts and only the latter part of the opinion are printed.

bill filed by a party whose character or business will be injured by the publication. *Brandreth* v. *Lance*, 8 Paige, 24.

In Eden on Injunctions (3 ed., page 372) it is said: "There is, perhaps, but one instance in the books, of any judge having maintained the existence of a power in the Court of Chancery of restraining publications on any other ground but that of property and copyright; and it was then done in language so strange and unconstitutional, as to carry on its face its own refutation."

In *Singer Mfg. Co.* v. *Domestic S. M. Co.* (49 Ga. 70), the court said: "It is well settled that an injunction will not be granted to restrain slander or libel of title or of reputation." (Citing cases.) "Not that it is not wrong, not that the wrong may not be irreparable, but simply because Courts of Chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law."

In *Mauger* v. *Dick* (55 How. Pr. 132) it is said: "The jurisdiction of a court of equity does not extend to false representation as to the character or quality of plaintiff's property, or to his title thereto, when it involves no breach of trust or contract, nor does it extend to cases of libel or slander. . . . If the plaintiff has any remedy it is by action at law." (See also Pomeroy's Eq. Jur., § 320, note 3; *Mulkern* v. *Ward*, L. R. [13 Eq. Cases] 619; Kerr on Injunctions [2 Am. ed.], p. 377; High on Injunctions [3 ed.], § 1015; Beach on Injunctions, Vol. 1, p. 73).

In *Kidd* v. *Horry* (28 Fed. Rep. 773) application was made to Mr. Justice BRADLEY for an injunction to restrain defendants from publishing libellous circulars concerning plaintiff's business and patent rights pending the trial of the principal suit brought to restrain infringement of patents. The learned justice said: "The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities." (Citing cases.) "An examination of these and other cases relied on convinces us that they depend on certain peculiar acts of the Parliament of Great Britain, and not on general principles of equity jurisprudence." After commenting upon the English statutes he further says: "But neither the statute law of this country nor any well-considered judgment of the courts has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none we deem of sufficient authority to justify us in assuming the jurisdiction." (Citing cases in this state and other states in support of the proposition.)

To the same effect are *Baltimore Car Wheel Co.* v. *Bemis* (29 Fed. Rep. 95); *Mayer* v. *Journeymen Stonecutters' Ass'n* (47 N. J. Eq. 519), which was an application to the chancellor to restrain the circulation of libellous matter, and *Francis* v. *Flinn* (118 U. S. 385), in which the bill prayed an injunction against sundry things done by defendants against plaintiff's pilot boat, among other things false publications. Mr. Justice FIELD said: "The bill does not state what the publications were.

. . . If the publications in the newspapers are false and injurious he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law."

Our attention is not called to any decisions in this state in suits founded solely on slander or libel for which an action at law could not be maintained, holding a contrary doctrine, nor to any text-writers differing from those cited.

In *Hovey* v. *Rubber Tip Pencil Co.* (57 N. Y. 119) the action was one of libel and it was sought therein to restrain defendant's publication wherein it claimed to be the owner of valuable rights secured by letters patent, but the only question decided by the court was, that the court below had rightly determined that the action was not one within its jurisdiction; and the case is authority for no other proposition.

Croft v. *Richardson* (59 How. Pr. 356) is a Special Term decision which seems not to have received very careful consideration, but even in that case a cause of action for libel upon property was stated.

The case of *Vegelahn* v. *Guntner* (167 Mass. 92) was a bill against fourteen individuals and a trade union and it alleged conspiracy. There was no question of libel involved, but instead, an injunction was sought against patrolling in front of plaintiff's premises, threatening with violence those willing to be employed, etc., the object of the plaintiff being to checkmate a conspiracy to prevent him from getting workmen.

Beck v. *Ry. Teamsters' Pro. Union* (118 Mich. 497) was a boycott case and enjoined "picketting, and distribution of boycotting circulars and all acts of intimidation and coercion." It recognized, however, the general principle, that an injunction will not ordinarily issue to restrain an individual from publishing a libel where there is no conspiracy, no intimidation, and no acts of coercion.

Casey v. *Cin. Typ. Union No. 3* (45 Fed. Rep. 135) was an action brought for the purpose of checkmating an alleged combination or conspiracy by a trade union to boycott a newspaper for refusing to unionize its force, which combination was held to be unlawful by Judge SAGE of the U. S. Circuit Court, and as an incident to the relief granted he enjoined the publication and circulation of posters, handbills, and circulars, printed and circulated in pursuance and in aid of such combination or conspiracy to boycott.

We do not express any views upon either one of the three decisions which aimed at the restrainment of those who were engaged in boycotting, for it quite sufficiently appears that whatever may be their value as decisions they are not in point in this controversy, for the question was not up for consideration, whether the publication of an alleged libel upon property which did not result in damages which could be proved should be restrained. There were more important questions involved in the disposition of those cases than whether the

circulation of libellous matter could be enjoined, the latter being a mere incident brought in with everything else that it was deemed necessary to enjoin in order to break down the boycott.

Emack v. *Kane* (34 Fed. Rep. 46), which is a decision by a single judge, seems to be authority in support of plaintiff's contention. A very careful examination of it, however, leads to the conclusion that its attempt to overthrow the reasoning of Mr. Justice BRADLEY in *Kidd* v. *Horry* (*supra*) was not successful.

Our conclusion from a review of the authorities, therefore, is, that all well-considered decisions agree in determining it to be the law that a court of equity has not jurisdiction to grant the relief to secure which this suit was brought.

The order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs in all courts.

GRAY, O'BRIEN, CULLEN, and WERNER, JJ., concur; BARTLETT and HAIGHT, JJ., dissent.

Ordered accordingly.[1]

SHOEMAKER *v.* THE SOUTH BEND SPARK ARRESTER COMPANY.

SUPREME COURT OF INDIANA, NOVEMBER 22, 1893.

[135 *Indiana Reports*, 471.]

HACKNEY, J. The appellee sued the appellant, in the court below, upon a complaint alleging title to certain letters patent granted by the United States government, derived through a judgment of the St. Joseph Circuit Court theretofore rendered in an action between appellee's assignors and this appellant, wherein the title to said letters patent was in issue and was claimed by such assignors and by this appellant.

Enough of the issues and judgment in that case is pleaded in the complaint herein to show that said action was to quiet the title to said letters patent, and settle the conflicting claims of the parties thereto, and to restrain the appellant from asserting adverse claims thereto. The title was found to be in others, and that this appellant had no interest therein. Upon the title so derived, the appellee sought and secured, in this suit, an injunction against the appellant from representing to the public, and to the customers and agents of the appellee, that he owned said letters patent, or had any interest therein, and from issuing and publishing any demand for royalty or license fees for the use of the invention and improvement covered by such letters, and from threatening litigation with any person who had bought, or might buy or offer to buy, spark arresters covered by such patents, and from advertising

[1] Covell *v.* Chadwick, 153 Mass. 263 (*semble*). *Accord.* See Willis *v.* McConnell, 231 Fed. 1004.

that appellee had not the right to collect the price of any such sales, and from questioning appellee's title to such letters.

The theory of the complaint is that the false and malicious claims of title by appellant, and threats to collect royalties from appellee's customers, and to involve them in litigation for infringements, was injurious to appellee's business, and materially affected its property rights in said letters patent, and in the value of spark arresters made by it, in that such claims persuaded and deterred persons from buying them, and rendered their invention and investment valueless.

. . . . . .

The complaint before us involves more than libel of title, it charges the false and malicious destruction of the appellee's property rights in injuring its business, deterring others from dealing with it, and rendering valueless its inventions and improvements, its investments and manufactures. It is more than a mere libel not interfering with property rights. The distinction between the two classes of cases is made and enforced by Mr. Justice Blodgett, in *Emack* v. *Kane*, 34 Fed. Rep. 46. In that case, in speaking of *Kidd* v. *Horry* (28 Fed. 773), it was said: "The principle of this case, concisely stated, is that a court of equity has no jurisdiction to restrain the publication of a libel or slander. But it seems to me the case now under consideration is fairly different and distinguishable from the cases relied upon by the defendants in what seems to me a material and vital feature. In *Kidd* v. *Horry*, the owner of a patent sought the interference of a court of equity to restrain the defendants from publishing and putting in circulation statements challenging the validity of his patent, and of his title thereto, on the ground that such publications were libellous attacks upon his property. Here the complaint seeks to restrain the defendants from making threats intended to intimidate the complainant's customers under the pretext that complainant's goods infringe a patent owned or controlled by the defendants, and threats that if such customers deal in complainant's goods, they will subject themselves to a suit for such infringement; the bill charging, and the proof showing, that these charges of infringement are not made in good faith, but with a malicious intent to injure and destroy the complainant's business.

"While it may be that the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade, or otherwise, yet, if the owner of a patent, instead of resorting to the courts to obtain redress for alleged infringements of his patent, threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor, and destroying his competitor's business, it would seem to make a widely different case from *Kidd* v. *Horry*, and that such acts of intimidation should fall within the preventive reach of a court of equity.

"It may not be libellous for the owner of a patent to charge that an

article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the *gravamen* of this case is the attempted intimidation by defendant of complainant's customers by threatening them with suits which defendants did not intend to prosecute; and this feature was not involved in *Kidd v. Horry*.

"I cannot believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainants, as shown by the proofs in this case.

"It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. . . . Redress for mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ."

Little has been said by the learned judge in that case, which is not fully applicable in this case, and here we have an element not included in that case, namely, the insolvency of the appellant, whereby an action at law would be wholly inadequate.

In the case of the *Life Ass'n* v. *Boogher* (3 Mo. App. 173), it was held that insolvency did not enlist the aid of the court of equity, but we are disinclined to accept that case as authority. It is not only out of line with the holdings of this court upon that question, but it holds that the constitutional guarantee of the freedom of the press and of speech is a protection to one against equitable interference in publishing false and injurious statements. In neither of these positions can we believe it sound.[1]

[1] Emack *v.* Kane, 34 Fed. 46; Lewin *v.* Welsbach Light Co., 81 Fed. 904; Farquhar Co. *v.* National Harrow Co., 99 Fed. 160; Adriance, Platt & Co. *v.* National Harrow Co., 121 Fed. 827, 98 Fed. 118; Dittgen *v.* Racine Paper Goods Co., 164 Fed. 85; Electric Renovator Co. *v.* Vacuum Cleaner Co., 189 Fed. 754; Atlas Underwear Co. *v.* Cooper Underwear Co., 210 Fed. 347. *Accord.*

But see American Malting Co. *v.* Keitel, 209 Fed. 351.

BECK *v.* RAILWAY TEAMSTERS' PROTECTIVE UNION.

SUPREME COURT, MICHIGAN, NOVEMBER, 1898.

[118 *Michigan Reports*, 497.]

BILL by Jacob Beck and others, copartners as Jacob Beck & Sons, against the Railway Teamsters' Protective Union, the Detroit Council of Trades and Labor Unions, George Innis, and others, to enjoin the boycotting of complainants' business. From a decree enjoining merely the use of violence or threats of violence, complainants appeal. Modified.[1]

The boycotting circular is as follows:

"BOYCOTT

"JACOB BECK & SON'S FEED MILLS.

"To Organized Labor and Their Friends:

"The above firm has broken faith with the representatives of the Trades Council and the Railway Teamsters' Union, by annulling an agreement entered into with the above organizations in July last, that none but union men should be employed by that firm thereafter.

"They have now discharged their union men, and hired nonunion men to take their places. We therefore ask all people who believe in living wages and fair treatment of employees to leave this firm and their product severely alone.

"BOYCOTT BECK & SON,

"By order of DETROIT TRADES COUNCIL."

GRANT, C. J. It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties cannot interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. If all there was to this transaction was the publication of a libellous article, the position would be sound. It is only libellous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning

[1] The statement of the pleadings and all but the last point of the opinion, dealing with other matters, are omitted.

they attached to the word "boycott," and they all evidently understood it as the defendants interpreted it by their conduct and acts. It is true that, under our Constitution, no one can be enjoined from publishing a libel. (Const. Mich., art. 4, § 42.) By this provision, every person is entitled to "freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right." See *Hamilton-Brown Shoe Co.* v. *Saxey,* 131 Mo. 221 (52 Am. St. Rep. 622).

We are not unmindful of the difficulty often presented to the courts to determine what constitutes an unlawful boycott, and to determine what acts come within the jurisdiction of the courts to enjoin and punish, and what belong to the legislative department to protect the public against. As already shown, injury, or even ruin, to one's business, may result from lawful competition and combination of either labor or capital, and, in such cases, the public are indirectly injuriously affected. In both England and in some of the United States these combinations, which are supposed to injuriously affect the public, have been the subject of legislation, and unlawful combinations have been defined, and punishment thereof provided. The aim of the courts has been, not to introduce into their decisions new principles, but to apply old and well-established ones, for the equal protection of all persons. In *Pasley* v. *Freeman,* 3 Term R. 63, Ashhurst, J., said:

"Where cases are new in their *principle,* there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance,* and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

This rule is recognized in *Arthur* v. *Oakes,* 11 C. C. A. 209, 63 Fed. 310 (25 L. R. A. 414), and by Justice Chaplin in *Burke* v. *Smith,* 69 Mich. 395.

. . . . . .

The decree must be modified so as to enjoin picketing, the distribution of the boycotting circular, and all acts of intimidation and coercion.[1]

[1] Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551; Gompers *v.* Buck's Stove & Range Co., 221 U. S. 418; Cœur D'Alene Mining Co. *v.* Miners' Union, 51 Fed. 260 (intimidation of employees); Casey *v.* Cincinnati Typographical Union, 45 Fed. 135 (handbills incidental to boycott); Seattle Brewing Co. *v.* Hansen, 144 Fed. 1011 (notices incidental to boycott); American Federation of Labor *v.* Buck's Stove & Range Co., 33 App. D. C. 83 (advertisement as part of boycott); National Life Ins. Co. *v.* Myers, 140 Ill. App. 392 (malicious publication as part of conspiracy to destroy business); Gilly *v.* Hirsh, 122 La. 966 (libellous sign treated as nuisance); Sherry *v.* Perkins, 147 Mass. 212 (nuisance in form of banners displayed in front of plaintiff's premises); Pratt Food Co. *v.* Bird, 148 Mich. 631 (bill of peace, unlawful threats of prosecution in printed circular); Shoe Co. *v.* Saxey, 131 Mo. 212 (intimidation);

Lohse Door Co. *v.* Fuelle, 215 Mo. 421 (boycott); Gilbert *v.* Mickle, 4 Sandf. Ch. 357 (placard posted before door of auctioneer warning against "mock auctions"); Newton Co. *v.* Erickson, 70 Misc. 291; McCormick *v.* Local Unions, 32 Ohio Cir. Ct. R. 165 (printed cards in course of boycott). *Accord.* Cf. Philip Henrici Co. *v.* Alexander, 198 Ill. App. 568, 574.

Francis *v.* Flinn, 118 U. S. 385 (*semble*); Citizens' Light Co. *v.* Montgomery Light Co., 171 Fed. 553; Truax *v.* Bisbee Local No. 380, 19 Ariz. 379, 393 (libellous advertisements, handbills and banners); Reyes *v.* Middleton, 36 Fla. 99 (cloud on title); Marx & Jeans Clothing Co. *v.* Watson 168 Mo. 133 (boycotting); Lindsay & Co. *v.* Montana Federation of Labor, 37 Mont. 264. *Contra.*

SECTION II.

PROTECTION OF INTERESTS OF PERSONALITY.

CHAPPELL *v.* STEWART.

COURT OF APPEALS, MARYLAND, JANUARY 8, 1896.

[82 *Maryland*, 323.]

BRYAN, J., delivered the opinion of the Court.

Thomas C. Chappell filed a bill in equity against David Stewart. Without entering minutely into the details of the bill of complaint, it may be stated that he charged that the defendant had employed detectives to follow him and watch him wherever he should go; and that this conduct caused him great inconvenience and annoyance, interfered with his social intercourse and his business; and caused grave suspicions to be entertained about him, so as greatly to damage his financial credit. It is also alleged that the defendant intended to continue the same course of conduct towards the complainant. The bill prayed for an injunction to restrain and prohibit the defendant from the aforesaid conduct; and for a decree for damages; and for general relief. He also filed a special motion for a preliminary injunction. The defendant filed a demurrer and answer combined together. It was maintained that the bill of complaint did not entitle the complainant to any relief in equity, because it did not set forth any legal or equitable right which the defendant was injuring; because it did not set forth any danger of irreparable damage, and for other reasons. And the answer denied the charges of the bill. The Court refused to grant the preliminary injunction. The defendant, by leave of the Court, amended his pleading by changing its form so as to make it simply an answer and nothing more. Afterwards the Court passed an order sustaining the demurrer and dismissing the bill with costs.

The Court acted inadvertently in passing an order on the demurrer, when, in consequence of an amendment of the defendant's pleading, there was no longer a demurrer in the case. We shall see whether this oversight inflicted any injury on the plaintiff. As the answer denied the allegations of the bill, and the motion for a preliminary injunction was heard on bill and answer, it was of necessity that the motion should be denied. And as the bill, assuming that all its allegations were true, did not contain any matter cognizable in equity, it ought then and there to have been dismissed. Courts of Equity exercise a very extensive

jurisdiction in cases involving property rights. The occasion does not require us to state its precise limits. It is usually said in general terms that it does not exist where a plain, adequate, and complete remedy can be obtained at law. In this case it is alleged that rights affecting the complainant's person have been violated, and that there is a purpose to persist in violating them. The ordinary processes of the law are fully competent to redress all injuries of this character. They have always been considered beyond the scope of the powers of a Court of Equity. In *Gee* v. *Pritchard*, 2 Swanston 440, Lord Eldon said: "The question will be whether the bill has stated facts of which the Court can take notice, as a case of civil property, which it is bound to protect." In *Bispham's Equity* (fifth edition), 584, note 2, it is said: "But it is the rights of property, or rather rights in property, that equity interferes to protect; a party is not entitled to a writ of injunction for a matter affecting his person." In *Kerr on Injunctions*, pages 1 and 2, it is said: "A Court of Equity is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A Court of Equity has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. If a charge be of a criminal nature, or an offence against the public peace, and does not touch the enjoyment of property, jurisdiction cannot be entertained. The Court has no jurisdiction to restrain or prevent crime, or to enforce the performance of a moral duty, except so far as the same is concerned with rights to property; nor can it interfere on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, or for putting a stop to acts, which, if permitted, would lead to a breach of the public peace." We, of course, do not intend to express an opinion on the merits of any action at law which the complainant may see fit to bring.

Decree affirmed with costs.[1]

[1] Atkinson *v.* Doherty & Co., 121 Mich. 372; Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538; Murray *v.* Gast Lithographic Co., 8 Misc. 36; Kneedler *v.* Lane, 3 Grant Cas. (Pa.) 523; Ashinsky *v.* Levenson, 256 Pa. 14, 19; Angelus *v.* Sullivan, (C. C. A.) 246 Fed. 54, 64. *Accord.* But the first three cases deny the legal right. See Woolcott *v.* Shubert, 169 App. Div. 194; Williams *v.* O'Shaughnessy, 172 N. Y. Suppl. 574.

Corliss *v.* Walker Co., 57 Fed. 434 (*semble*); Itzkovitch *v.* Whitaker, 115 La. 479, 117 La. 708; Schulman *v.* Whitaker, 117 La. 704; Munden *v.* Harris, 153 Mo. App. 652 (*semble*); Marks *v.* Jaffa, 6 Misc. 290. *Contra.* Compare Edison *v.* Edison Polyform Co., 73 N. J. Eq. 136.

Most of the cases have turned on the existence and scope of the legal right. See Hodgeman *v.* Olsen, 86 Wash. 615.

In New York, a statute now permits an injunction where one's name or portrait is used without his consent for advertising purposes or for purposes of trade. Binns *v.* Vitagraph Co., 210 N. Y. 51; Humiston *v.* Universal Film Co., 101 Misc. 3.

HODECKER *v.* STRICKER.

SUPREME COURT OF NEW YORK, SPECIAL TERM, MARCH, 1896.

(39 *New York Supplement*, 515.)

ACTION by Anna Hodecker against Emma Stricker for an injunction. Defendant demurs to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. Sustained.

BRADLEY, J. The plaintiff, in her complaint, alleges that she is the lawful wife of Frederick Hodecker; that the defendant, with knowledge of this, resides with him, in relations immoral and meretricious, and assumes to bear the surname of Hodecker, and that such appropriation of the plaintiff's name of Hodecker, by thus falsely personating her, is calculated to prejudice the plaintiff's standing in the community, as well as to scandalize and injure her in name and fame, as the lawful wife of the said Frederick Hodecker; and that "by reason of the premises the plaintiff has been scandalized, slandered, defamed, humiliated, defrauded, libelled, and otherwise injured among the community, and greatly distressed in mind, to her damage of ten thousand dollars." She therefore demands judgment for injunctive relief and for damages. The novelty of the action, in its nature, and upon the facts alleged in its purpose, calls for its careful consideration; and if the matters charged, in the view taken of them, will support any legal relief, the plaintiff is entitled to judgment upon the issue of law raised by the demurrer. The action is not founded upon any charge of libel or slander, nor is it charged that the defendant has alienated from the plaintiff the affections of her husband. It rests solely upon the charge that the defendant, residing with the husband of the plaintiff, has wrongfully appropriated and assumed to have the surname of Hodecker; in other words, that she has taken the apparent relation of wife, and assumed the name to which the plaintiff alone is entitled. And the plaintiff charges that, as the consequence, this may tend to deny to her, in the community, the enjoyment of the reputation such as she would otherwise have in that relation and name, and result to her defamation. This apprehension of the plaintiff, presumably, is founded on the fact that she previously cohabited with Frederick Hodecker as his wife. Although she then was, and still is, such wife, it may be that if other persons should, by want of knowledge of the situation, treat the defendant as his wife, some opportunity might arise to question that relation of the plaintiff to him, resulting in rumors in the community unpleasant to her. But, upon the facts alleged in the complaint, the plaintiff has her remedy by action for dissolution of the marriage contract, to relieve herself from the relation of wife to him, and from the name she derived from it, and thus from the apprehensions before suggested. This right, however, cannot detract from the legal force of any other relief, if any exist, upon the matters set forth

in the complaint. There is no allegation to the effect that any proprietary right or interest of the plaintiff is, or may be, affected or impaired by the alleged usurpation and assumption by the defendant of the relation and surname of the plaintiff as before mentioned; and therefore the legal principles applicable to remedies founded upon infringement or appropriation of trade-marks, and in kindred cases, have no necessary application to the question presented by the facts alleged in the complaint in the present action. It is said by counsel, that equity will not suffer a wrong without a remedy. This maxim has its limitation in another known as *damnum absque injuria*, and, further that obligations, rights, and duties merely moral are not the subject of equitable relief. As was said by the court in *Rees* v. *City of Watertown*, 19 Wall. 121, "It cannot assume control over that large class of obligations called 'imperfect obligations,' resting upon conscience and moral duty only, unconnected with legal obligations." The charge, in its import and legal effect, is not that the defendant seeks to personate the plaintiff, or represent her in any manner, but that the defendant misrepresents herself by falsely assuming the relation of wife and surname of the plaintiff's husband; thus degrading herself, and not the plaintiff. The cited remarks of Judge Peckham, *obiter*, in *Schuyler* v. *Curtis*, 147 N. Y. 434–443, 42 N. E. 22, have no essential application to the proposition in the present case. It was there held that the individual right of privacy dies with the person, and therefore the friends of the deceased woman could not deny to the defendants the right to erect a statue, in an appropriate manner, to do honor to her, although she may, while living, have had her remedy to defeat the execution of such a purpose. And in the cited case of *Foley* v. *Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471, it was held that the widow had a clear legal right to the remains of her deceased husband, for the purpose of preservation and burial, and consequently a remedy for the denial of that right, against the defendant, for performing an autopsy on his body without her consent, or authority of law. It is true that the determination of that case was not dependent upon any right of property; but the burial of the body of the deceased was a legal duty, and its possession and preservation for the purpose was a personal right of the wife, recognized by law. The plaintiff in the present case is the wife of Hodecker, and she alone is entitled to, and has, that relation to him. She does not complain that she has been excluded, by any act or influence of the defendant, from his marital society, protection, or affection. Nor can it be assumed from the allegations in the complaint that she has been. She does allege that for a long time she lived and cohabited with him as his wife, but fails to aver that she still lives with him, or that her cohabitation with her husband was discontinued for any cause attributable to the defendant. Nor does she allege that, but for the relation so assumed by the defendant to Mr. Hodecker, the plaintiff would have been in cohabitation with him, or have the benefit and enjoyment of his marital protec-

tion, care, or affection. It is therefore difficult to see in the matters alleged in the complaint any charge that the defendant has invaded any legal personal right of the plaintiff. It is, however, urged on the part of the plaintiff that the assumption by the defendant of the name of Hodecker is an assault upon the identity and individuality of the plaintiff, distressing to the latter. But, as before suggested, the defendant does not seek to personate the plaintiff, although she assumes to put herself in the apparent relation to Mr. Hodecker which in fact the plaintiff alone has to him. This enables the defendant to perform no act prejudicial to any proprietary right or interest of the plaintiff. In *Clifford* v. *Kampfe*, 84 Hun, 393, 32 N. Y. Supp. 352, and 147 N. Y. 383, 42 N. E. 1, the action was founded, and the complaint supported, upon the ground that the plaintiff therein, who was the wife of the male grantor in the deed in question, had an inchoate right of dower in the property, and that what purported to be the execution by his wife of the deed was, as against the plaintiff, a forgery. Her inchoate right of dower was an interest in the property, and, because the conveyance purported to divest the wife of such contingent estate in the land, her action was held available to remove the cloud thus made to appear, by the conveyance, upon her interest in the property. The question in that case was one of identity, which it was prudent, as well as desirable, to settle as early as practicable, for reasons which might affect others as well as the plaintiff in that action. The possibility that others may be misled by the assumed relation of the defendant to Hodecker does not concern the plaintiff, unless by that means some of her property rights or interests may be brought in question; and until then she has no legal cause of complaint to support relief upon the charges in the complaint, within the doctrine of the *Clifford case*. The question of the identity of the plaintiff as the wife of Hodecker, except so far as it may relate to consequences of her survival of him, is merely a social one, and cannot prejudice her legal rights as widow, such as they may be, in the event she survives him. Until then the matters alleged in the complaint present moral questions, for consideration only in the tribunal of conscience.

My examination of the case leads me to the conclusion that the facts alleged in the complaint do not support a cause of action, and therefore judgment is directed for the defendant.[1]

[1] Cf. Earl Cowley *v.* Countess Cowley, [1901] A. C. 450.

EX PARTE WARFIELD.

COURT OF CRIMINAL APPEALS, TEXAS, APRIL 26, 1899.

[40 *Texas Criminal Reports*, 413.]

HENDERSON, J. This is an original application for a writ of habeas corpus, which grew out of contempt proceedings in the Forty-fourth Judicial District Court of Dallas County. It appears that Will R. Morris, as plaintiff, brought a suit against J. B. Warfield, as defendant, before Judge Richard Morgan, in the Forty-fourth Judicial District Court of Texas, for $100,000. The petition alleges a number of acts on the part of J. B. Warfield, the defendant in that suit, interfering with marital relations existing between Will R. Morris and his wife, Vivia Morris, said acts causing a partial alienation of the affections of his said wife, and further suggesting that the course of conduct of said Warfield towards the wife of said Morris, if permitted to continue unrestrained, would likely culminate in the total alienation of the affections of his said wife, and the destruction of the marital relations existing between them. And said Morris asked for a writ of injunction restraining said Warfield from visiting or associating with plaintiff's said wife, or going to or near her at a certain house, No. 129 Marion Street, or any other house or place in the city of Dallas, or state of Texas, where his said wife might be, and that he be restrained from writing or speaking to her, or in any manner, either directly or indirectly, communicating with her, by word, letter, writing, sign, or symbol, and also asking that his agents and employees be restrained from the like, etc.; and that said Warfield and his agents and servants be restrained from interfering with plaintiff in his peaceful efforts to seek, talk, write, or communicate with his said wife, etc. The writ was granted on the 23d of February, 1899, and was served on Warfield on the following day, the 24th of February. On the 9th of March following, plaintiff sued out an attachment against said Warfield, alleging that he had violated said writ of injunction, and made a motion for rule against him for contempt for a violation thereof. Subsequently Warfield was brought before the court, and the matter of said contempt was tried before the Hon. Richard Morgan. A number of legal questions were raised, and the issue of fact was submitted before said judge as to whether or not said injunction had been violated. It was shown, in fact it was conceded by said Warfield, that on two occasions after the issuance and service of the said writ of injunction, he had met and talked with the wife of Morris. He claimed, however, that these meetings were casual, and that he indulged in no conversation with her violative of the spirit of said injunction, or calculated to make a breach of the marital relations existing between Morris and his wife. It is further shown that he went to the house, 129 Marion Street, where the wife of plaintiff, Morris,

was, but claimed that he had the right to go there, that being his boarding house, etc. A number of affidavits are filed pro and con, which it is not necessary to consider. The court, Judge Morgan presiding, adjudged Warfield in contempt of court, and assessed a fine against him of $100, and three days' imprisonment in the county jail. From which judgment Warfield, the defendant in said proceeding and the applicant here, sued out a writ of habeas corpus; and he claims now, as he did before the lower court, that the court in granting said writ of injunction had no power or authority to enjoin him from speaking to, or talking with, Mrs. Morris, or from visiting the house, 129 Marion Street; that the exercise of said power was beyond the jurisdiction of a court of equity, and was not merely irregular, but void, and imposed upon him no duty to obey the same. And he now insists that the use of said power by the court was violative of the Constitution and the fundamental law of the land, in that it was an effort on the part of the court to restrain the freedom of speech and of locomotion, and the rights of the defendant in the pursuit of happiness. Furthermore, it is contended that, although the matters complained about might be regarded as a violation of the letter of the injunction, it was not a violation of its spirit, and the court had no power to coin a criminal offense out of the acts of the applicant, and to punish him as for a contempt. On the other hand, it is contended, on the part of the respondent, that the granting of the writ of injunction was not void, but, at the most, could only be considered improvident or irregular; that the court below had jurisdiction of the subject matter and all the parties; and that, it not being the void exercise of power, this court can not take jurisdiction by virtue of the writ of habeas corpus.

. . . . . .

At the outset, we lay down this proposition: That wherever the court has authority to grant the writ of injunction, no matter what irregularities may attend the granting thereof, or however erroneously the court may have acted in granting the same, as long as the injunction exists, undissolved, it must be obeyed, and for a violation thereof the party will be held in contempt. 2 High on Inj., secs. 1416–1418. If, however, the court has no jurisdiction over the subject matter involved, or if it has exceeded its power, by granting an injunction in a matter beyond its jurisdiction, the injunction will be treated as absolutely void, and defendants in such case can not be punished for contempt for its alleged violation. Id., sec. 1425. The power of courts of equity to grant writs of injunction has a wide range of subjects. Courts and text-writers have sometimes attempted to enumerate them, but we believe that the matter is of such a character as to escape designation; and, where the attempt has been made, the text-books say that it would indeed be difficult to enumerate all, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defend-

ant, a court administers it by means of the writ of injunction. See 1 Spell. Extr. Relief, sec. 5. Indeed, the interposition of courts of equity by restraining orders is a matter of growth, and keeps pace with advancing civilization, and courts are continually finding new subjects for the interposition of equitable relief by writs of injunction. Formerly it seemed to be the rule that courts would only interfere where some property right or interest was involved; but now it seems the writ will be applied to an innumerable variety of cases, in which really no property right is involved. While in some of the cases the courts appear to adhere to the old rule, yet when we look at the case it is difficult to see any question of property right, but a vain endeavor on the part of the court to adhere to the old doctrine, while it reaches out for the protection of some personal right. In the note to *Chappell* v. *Stewart*, reported in 37 Lawyers' Reports Annotated, 783 (same case, 82 Maryland 323, 33 Atlantic Reporter, 542), the learned annotator attempts to classify the cases, where courts have interfered for protection of merely personal rights, as rights relating to physical life, and rights relating to the intellectual, moral, and emotional life, and we refer to the cases embraced in the note to said case. We quote from the conclusion of the annotator, as follows: "The variety of cases above referred to, in which personal rights are really protected by courts of equity, shows that, while it is a commonly accepted theory that their jurisdiction must rest upon rights of property, there are, at least, many exceptions to the rule, among them, cases of contract, trust, or breach of confidence, relating to personal rights, cases respecting the education and custody of children, and cases relating to privacy and reputation, such as those restraining the publication or exhibition of photographs or other representations of persons, and the publication of private letters. In addition to this are the cases relating to the security of the person and the protection of health and physical comfort. While, in many of these cases, the jurisdiction is nominally based on an alleged property right, it is plain that the observance of the rule that equity will be limited to rights of property is little more than nominal. In all this class of cases equity does concern itself about personal rights as the real subject of consideration. England relieved its courts of equity from any necessity for searching for rights of property on which to base its jurisdiction by Act 1873, § 25, subdivision 8, which gave power to grant an injunction in all cases in which it shall appear to the court to be just that such order should be made. Under such a statute, the English courts are entirely free to grant injunctions to protect personal rights, including the right of reputation, and injunctions against libels are in fact granted." Under this increased exercise of power, courts of equity grant injunctions to restrain one set of employees or servants of a railroad company from interfering with or molesting another set of employees, especially where the road is in the hands of a receiver. See *In re Railway Co.*, 24 Fed. Rep. 217; *United States* v. *Debs*, 64 Fed. Rep. 724. And so one who has

learned the business secrets of another by virtue of his employment will be restrained from interfering with the business of such former employer by writing letters, soliciting trade, etc. See *Loven* v. *People* (Ill. Sup.), 42 N. E. Rep. 82. And equity will interfere to restrain a husband from interfering with a wife or children after an agreed separation. *Sanders* v. *Rodway*, 16 Beav. 207; *Swift* v. *Swift*, 34 Beav. 266; *Hamilton* v. *Hector*, L. R. 6 Ch. App. 701; *Aymar v. Roff*, 3 Johns. Ch. 48, 49.

While equity will interfere in matters of contract involving personal services, a distinction is taken between affirmative and negative stipulations. Equity will not compel a servant to perform an act, but will restrain that servant from performing a negative stipulation, or some act negative in its character, involved or implied in the affirmative stipulation. See 1 Spell. Extr. Relief, sec. 11; 2 High on Inj., secs. 1164, 1165. Under this authority, it has been held that where an opera singer or actor has contracted to sing or play for plaintiff at his theatre, and nowhere else, without his permission, an injunction will be granted to restrain the party from singing elsewhere; the court thus preventing a breach of the negative covenant, although it can not specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff. See *Lumley* v. *Wagner*, 1 De Gex, M. & G. 604; *Daly* v. *Smith*, 38 N. Y. Super. Ct. 158. And see other authorities cited in 2 High on Inj., p. 902, note 2. From these cases will be seen somewhat of the growth and application of the modern doctrine of equity in granting writs of injunction. We might cite a number of other cases illustrative of this view, but do not deem it necessary. If we refer to the modern cases (especially under liberal statutes on the subject of granting writs of injunction), the old doctrine of the freedom of speech and of the press, and that courts will only punish after an act which is violative of one or the other, appears to be overthrown in England, as we have seen, by statute. And see *Kitcat* v. *Sharp*, 52 Law J. Ch. 134. Our statute, as we shall hereafter see, is as liberal as the English statute on the same subject. So, the cases of *People* v. *Durrant*, 116 Cal. 179, 48 Pacific Reporter, 75, and *Association* v. *Boogher* (Missouri), 4 Central Law Journal, 40,[1] would seem to have no application.

. . . . . .

We deduce from the foregoing authorities, and others that might be cited, these propositions: First. That courts of equity can authorize the issuance of writs of injunction in all cases of equitable cognizance, where the party shows himself entitled to the issuance of the writ under the well-known rules of equity. As ancillary to this, that the growth of the principles of equity in this regard have been greatly enlarged, so that it may be said that where a court of equity has jurisdiction of the case, and a party shows that he is liable to suffer injury by some act threatened or that may be done pending the litigation, whether this has regard to property in issue or to some personal right dependent upon

[1] 3 Mo. App. 173.

some personal act or conduct, the court will grant the writ. In such case, it can not be said that the court lacks the power, although, in doubtful cases, it may refrain from the exercise of such power. Second. That in actions purely legal, of which the law courts have exclusive cognizance, there is no authority to issue a writ of injunction. Third. In a case (and there have been many such) where it is doubtful whether the action is one at law or of equitable cognizance, as a general rule, where the case is brought in an equity court, the chancellor has the same power to issue the writ as if there was no question of the jurisdiction, and as long as the writ continues it must be obeyed.

So far we have spoken of the matter as if the jurisdictions were entirely separate, as is the case in England and in most of our states. But in Texas we have a blended system of law and equity, there being but one jurisdiction for both, and, by a stronger reason, the writ of injunction will be authorized in a doubtful case.

Now, recurring to the subject matter of this litigation, as set forth in plaintiff's petition, we think there can be no question that appellant sets forth a cause of action for the partial alienation of his wife's affections. The marital relation existing between these parties was a civil contract, binding, until it should be abrogated, upon both of the spouses. "He is entitled to the society of his wife, and may sue for damages any person enticing her away from him; and, whenever a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie." See 2 Lawson, Rights, Rem. and Prac., sec. 714. "It is a legal presumption that a wife's services and the comfort of her society are fully equivalent to any obligations which the law imposes upon her husband because of the marital relation, and her obligation to render family service is coextensive with that of her husband to support her in the family." Id., sec. 715; Schouler, Dom. Rel., sec. 41; *Bennett* v. *Smith*, 21 Barb. 439; *Barnes* v. *Allen*, 30 Barb. 663. A husband, from time immemorial, has an interest in the services of his wife, springing from the marital relation. In this state suits for personal injuries to her must be maintained by the husband predicated upon this idea. The suit here was brought for damages on an alleged partial alienation of the affections of his wife, and it was averred that, on account of the past conduct of the defendant in that suit, plaintiff was apprehensive, and had just grounds to fear, that, by a continuance thereof, the wife's affections would be entirely alienated. There would consequently be a breach and destruction of the matrimonial contract existing between the parties, by which plaintiff would entirely lose the affections and services of his said wife. These, it must be conceded, were of a peculiar value to plaintiff; and it would seem that, if the court had the power to maintain this suit for damages on account of the partial alienation of the affections of his said wife, he would have a right to invoke the restraining power of a court of equity to prevent

the utter alienation of his wife's affections and the utter destruction of the marital agreement. We believe this would be so under the liberal rules of equity, as now practiced in the courts, but much more so under the provisions of our statute on the subject of injunctions. Article 2989, Revised Statutes, provides that the judges of the district courts may grant writs of injunctions in the following cases: "(1) Where it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the appellant." This provision shows that it was intended to be broader than the ordinary authority, because, in the third subdivision of the act, the court is authorized to grant the writ in all other cases where the applicant for said writ may show himself entitled thereto under the principles of equity. For a construction of these provisions, see the able opinion of Judge Denman of the Supreme Court in *Sumner* v. *Crawford*, 91 Texas, 129. After reciting the provisions of the statute, the learned judge uses this language: "It will be observed that the latter portion of the article requires the case to be brought within the rules of equity, and does not undertake to state the circumstances entitling the applicant to the writ, and therefore, under it, it must appear that there is no 'adequate remedy at law,' as that term has always been understood. But the first portion of the article does state what facts will justify the issuance of the writ thereunder, and does not require that there shall be no adequate remedy at law." And we would further suggest that the question decided in said case is very much in point in this case, as showing the liberality of our courts in granting writs of injunction. The court below, it will be conceded, had jurisdiction and authority to maintain the suit, and it can not be seriously questioned that the principal object of the suit was to preserve the marital relations existing between plaintiff and his spouse, and to conserve, as far as may be, and rehabilitate, her affections for the plaintiff. It was claimed, by the continued conduct and interferences of the defendant in that suit, that the integrity of the marital relation was threatened, and, if his course of conduct was suffered to continue, that the marital relation would be destroyed. Among other things, it was alleged that said defendant exercised an undue influence over the wife of plaintiff, and, if suffered to associate with her and speak and talk with her, and visit her, it was very likely he would entirely corrupt and lead her astray, and therefore the power of the court was invoked to arrest these interferences, and defendant was enjoined from speaking or talking with her, or visiting the house where she was staying. It occurs to us, if the suit itself was maintainable, that the acts complained of were prejudicial to the plaintiff; indeed, that, by their continuation, the real object of the suit would be entirely frustrated; and that the court consequently had the power and authority to inhibit said defendant from interfering with plaintiff's wife, and that this was no interference with the inalienable rights of the citizen to go

where he pleased, and to associate with whom he pleased, and to pursue his own happiness in his appointed way, provided such course of conduct did not interfere with another's right. "He had a perfect right to so use his own as not to abuse another's." Nor is there any inconsistency, when thus construed, between the freedom of speech and of the press and the integrity of the marital relation. The law is as much bound to protect the one as the other, and, when both can be construed in harmony, it is the duty of the courts to protect both.

It has been said that applicant was not shown to have violated the spirit of the injunction, inasmuch as no conversation was shown of a character calculated to persuade or lead away the wife of the plaintiff; but his conduct was certainly in violation of the letter of said injunction, and we can not say that the court did not have the right and authority to make the injunction as broad as it did, as, under the allegations of the petition, it is shown that defendant was not to be trusted in the society of Mrs. Morris, or to speak with her.

But, even if it be conceded that the act of the court in this regard is of doubtful validity, — that is, that it may or may not be void, still we do not feel inclined to interfere. The defendant in that suit had his right to invoke the action of that court to dissolve that injunction. He did not do so, but he saw fit to wilfully disregard it, and he now claims before this court that the same was absolutely void, and that he had the right to defy it and set it at naught. It occurs to us that the injunction could have been easily obeyed, without infringing upon any of the fundamental rights of the applicant. We accordingly hold that the applicant does not show himself entitled to be relieved. It is therefore ordered that he be remanded to the custody of the sheriff of Dallas County, and undergo the sentence imposed upon him by the judge of the Forty-fourth Judicial District Court. It is further ordered that the costs incurred in this court be taxed against the applicant.

Relator remanded to custody.[1]

VANDERBILT *v.* MITCHELL.

COURT OF ERRORS AND APPEALS, NEW JERSEY, JUNE 17, 1907.

[72 *New Jersey Equity*, 910.]

ON appeal from a decree of the court of chancery advised by Vice-Chancellor Garrison, whose opinion is reported in *71 N. J. Eq. (1 Buch.) 632.*

The bill in this case is filed by John Vanderbilt against Myra L. J.

[1] The statement of the facts, arguments of counsel, and parts of the opinion are omitted. Compare Stephens *v.* Stephens, 62 Tex. 337 (injunction against remarriage pending suit to avoid decree of divorce). See Starke *v.* Hamilton (Ga.) 99 S. E. 861.

Vanderbilt, his wife, William Godfrey Vanderbilt, an infant, appearing herein by guardian, and Henry Mitchell, as medical superintendent of the bureau of vital statistics of the state of New Jersey.

The complainant charges that he is the husband of the defendant Myra L. J. Vanderbilt; that they were married in this state in February, 1901, and then were, and are now, residents of this state; that they lived together as man and wife for two months after the marriage, and no longer; that from September, 1901, to July, 1903, the wife and a third party named lived together in adultery at a place designated in the bill, and that during said period complainant had no matrimonial access to his wife; that as a result of the adulterous intercourse there was born to the said wife, in the state of New Jersey, on or about the 20th day of October, 1903, a male child by her named William Godfrey Vanderbilt, which infant is one of the defendants herein; that the complainant is not the father of the child but that the infant is an adulterine bastard.

The bill charges that the defendant Myra L. J. Vanderbilt, upon the birth of said infant, falsely stated to the attending physician that the complainant was the father of the child, and that the child was the lawful issue of said marriage between herself and the complainant; that she made these false statements to induce the physician to insert them in the birth certificate, which the physician did, transmitting the certificate to the bureau of vital statistics, where it was duly filed and recorded. . . .

The relief sought is the cancellation of this fraudulent record and the destruction of its evidential character as to the paternity of the infant; in effect, a decree of nullity as to this status of parentage thus *prima facie* created and fraudulently recorded against the complainant. The complainant seeks a permanent injunction restraining both the mother and the child from claiming, under this certificate, for the said child, the status, name, property or privilege of a lawfully begotten child of the complainant.

An injunction is also prayed for against the issuing, by the state medical superintendent, of copies of this fraudulent record, and against Myra L. J. Vanderbilt and William Godfrey Vanderbilt from using or offering in evidence the record, or certified copies thereof, or in any way availing themselves of its evidential character.

The court below sustained a demurrer to the bill, on the ground that the case did not fall within any recognized head of equity jurisprudence, that no property right is shown to be involved, and that a court of equity could not take cognizance of personal rights or redress personal wrongs not affecting property.[1] . . .

DILL, J.

If it appeared in this case that only the complainant's status and personal rights were thus threatened or thus invaded by the action of the

[1] Parts of the statement of facts and of the opinion are omitted.

defendants and by the filing of the false certificate, we should hold, and without hesitation, that an individual has rights, other than property rights, which he can enforce in a court of equity and which a court of equity will enforce against invasion, and we should declare that the complainant was entitled to relief, and to a decree establishing the truth as to the paternity of the child, relieving the complainant of the intolerable burden *prima facie* put upon him by the false record and preventing the wife from perpetuating a fraud upon the husband. *Pavesich* v. *New England Life Insurance Co.*, 122 Ga. 190, adopting the dissenting opinion of Justice Gray, and rejecting the doctrine laid down by the majority in *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538, a case seldom cited but to be disapproved, the force of which was subsequently removed by statute. *Laws of N. Y.*, 1903, p. 308, ch. 132.

But it is not necessary to place the decision upon this ground, because there are sufficient facts presented to enable us to put this case upon the technical basis that the jurisdiction we are exercising is the protection of property rights, and to declare that the complainant is entitled to restrain the unwarranted use of his name as the father of the child upon the ground that such action is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability.

In many cases courts have striven to uphold the equitable jurisdiction upon the ground of some property right, however slender and shadowy, and the tendency of the courts is to afford more adequate protection to personal rights and to that end to lay hold of slight circumstances tending to show a technical property right. See *note*, 37 L. R. A. 787.

It sufficiently appears that the complainant's property rights now existing, and the contingent interest of himself and of other parties, are seriously menaced by the unlawful and unwarranted use of the complainant's name as the father of the child in the recorded birth certificate. . . .

The jurisdiction of a court of equity to interfere where there has been an unwarranted use of a man's name, the probable effect of which is to expose him to risk of future liability, has been sustained by authority. In England the court of chancery, even under the more restricted rule that there prevails, sustained an injunction to restrain the unauthorized use in a prospectus of a man's name as a trustee of a corporation. *Routh* v. *Webster*, 10 Beav. 561. The unauthorized use of the name of "The Times" newspaper in London was also restrained by parties engaged in the sale of cycles. *Walter* v. *Ashton*, L. R. 2 Ch. Div. 282 (1902).

In each of these cases an injunction was granted because the unauthorized use of the plaintiff's name was calculated to injure his property and to expose him to risk of future liability. In neither case was a present property right actually prejudiced, but only threatened and liability only anticipated.

In *Routh* v. *Webster, supra,* the master of the rolls, Lord Langdale, said:

"I think that the plaintiff is entitled to the injunction. I have no doubt that the plaintiff never did consent to be a trustee. . . . The name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee; his name was also used at the bankers; and though he may not be subjected to the duties of trustees, yet it is plain that he is exposed to some risk by the unauthorized act of the defendants in using his name."

In *Prudential Assurance Co.* v. *Knott,* L. R. 10 Ch. Ap. Cas. 142 (1875), Lord Cairns approved *Routh* v. *Webster* in these words:

"That case appears, if I may say so, to have been quite rightly decided. The difficulties in which the plaintiff might have been placed . . . are obvious, and he was held entitled to restrain, not any libel, for there was no libel, but that improper and unauthorized use of his name."

In *Walter* v. *Ashton, supra,* Justice Byrne said:

"The principle is clear enough; the court does not grant an injunction to restrain the use of a man's name simply because it is a libel or calculated to do him injury; but if what is being done is calculated to injure his property, and the probable effect of it will be to expose him to risk or liability, then, if I rightly understand the law of this court, an injunction is the proper remedy."

Furthermore, this case comes within the well-settled rule that a court of equity will prevent the threatened invasion of property rights and protect a party from exposure to the risk of litigation and liability.

It is clear that the complainant has a property interest under his mother's will in certain specific real estate in New York City, consisting not only of an income for life, but of a vested remainder in a certain undivided share of the real estate in question.

This vested remainder is, under the real property law of New York, as a future estate, descendible, devisable, and alienable in the same manner as an estate in possession. *Real Prop. L.* (*N. Y.*), §§ 26, 27, 30, 49.

There is more than a "tangible probability," to use the phrase employed in *Walter* v. *Ashton, supra,* that a claim will be made by or in behalf of the infant upon the estate of the complainant in the event of his death, whether he leaves a will or dies intestate. His right to make absolute disposition of his estate by will is menaced by the fraudulent record. His property is exposed to the risk of litigation after his death to the detriment of his lawful heirs. . . .

The absence of precedents or novelty in incident presents no obstacle to the exercise of the jurisdiction of a court of equity.

The case presented is novel in incident, but not in principle; but it is no objection to the exercise of jurisdiction that in the ever-changing phases of social relations a new case is presented and new features of wrong are involved.

As said by Lord Hardwicke, in his letter to Lord Kames on the principles of equity, dated June 30th, 1759:

"Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." *Parkes' Hist. Ct. Ch.* 508.

Chancellor Cottenham, in *Wallworth* v. *Holt,* 4 Myl. & C. 619, said:

"I think it the duty of this court [meaning equity] to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice and enforce rights for which there is no other remedy."

Paraphrasing the language of Justice Herrick, in *Green Island Ice Co.* v. *Norton,* 105 App. Div. (N. Y.) 331, the jurisdiction of equity is constantly growing and expanding, and relief is now granted in cases where formerly the courts would not have thought for a moment of so doing. From time immemorial it has been the rule not to grant equitable relief where a party praying for it had an adequate remedy at law, but modern ideas of what are adequate remedies are changing and expanding, and it is gradually coming to be understood that a system of law which will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society. . . .

Finally, the technical basis of the jurisdiction we are exercising is the protection of property rights. The equitable character of the action itself requires us to regard comparatively remote and trifling interferences with such property rights in the light of the great and immediate interference with the personal rights of the complainant, although, as we have already stated, whether this bill might not be rested on such personal basis alone, without reference to the technical protection of property, is not now decided, because the present case does present the property feature to an extent sufficient to satisfy even the rule adopted by the court below.

Upon the whole case, we are of the opinion that the court of chancery has jurisdiction to afford the complainant ample and complete relief, as already indicated in this opinion; that, should the court of chancery refuse relief under the circumstances stated in the bill, it would cease to be a court of equity governed by principles of natural justice, especially where property rights may be said to be threatened and personal rights are clearly invaded.

The decree sustaining the demurrer is reversed.

For affirmance — None.

For reversal — THE CHIEF-JUSTICE, GARRISON, FORT, HENDRICKSON, PITNEY, SWAYZE, REED, TRENCHARD, BOGERT, VREDENBURGH, VROOM, GREEN, GRAY, DILL — 14.

SECTION III.

PROTECTION OF SOCIAL AND POLITICAL RELATIONS.

RIGBY *v.* CONNOL.

IN THE CHANCERY DIVISION, FEBRUARY 24, 1880.

[14 *Chancery Division*, 482.]

THIS was an action by the Plaintiff, who had been expelled from a trades union of which he was a member, against the committee and trustees of the union, claiming to be entitled to share in the benefits of the union, and that the Defendants might be restrained from excluding him therefrom.[1]

JESSEL, M. R.:

The first question that I will consider is, what is the jurisdiction of a Court of Equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's Courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any Court of Justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any Court of Justice could interfere with such an association if some of the members declined to associate with some of the others. That is to say, the Courts, as such, have never dreamt of enforcing agreements strictly

[1] Only part of the statement of facts and only the portion of the opinion dealing with the jurisdiction of equity are printed. That part of the decision which construes the Trade Union Acts (1871 and 1876) was overruled in Yorkshire Miners' Ass'n *v.* Howden, [1905] A. C. 256.

personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy—in such cases no Court of Justice can interfere so long as there is no property the right to which is taken away from the person complaining.

If that is the foundation of the jurisdiction, the Plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him. That this is the foundation of the interference of the Courts as regards clubs I think is quite clear. If we look at the Lord Chancellor's judgment in the case of *In re St. James's Club*, 2 D. M. & G. 383, 387, he says this: "What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and, if the club was broken up while he was a member, he might file a bill to have its assets administered in this Court, and he would be entitled to share in the furniture and effects of the club." So that he puts it that the member has an interest in the assets.

In the case of *Hopkinson* v. *Marquis of Exeter*, Law Rep. 5 Eq. 63, 66, Lord *Romilly* says this: "This is an application by the Plaintiff asking a declaration that he is entitled to the enjoyment of the property and effects of the *Conservative Club*, and to participate in its rights, privileges, and benefits, and also that the Defendants, the committee of the club, may be restrained by injunction from excluding him therefrom." So that he starts with the enjoyment of property, and the subsequent cases have gone on the same ground.

The present Plaintiff certainly does not state in his statement of claim that there is any property at all here, and I think that that is a fatal objection to the statement of claim altogether, and I might, if I thought fit, dismiss the action simply on that ground. He states nothing but that there is an association which he calls a "Trades Union,"—the "*Journeymen Hatters' Fair Trade Union*"—as governed by rules. He says that he has been a member, and that he has been unfairly and improperly expelled, but he does not allege that there is any property of any kind or description belonging to the union, or that he is entitled to any share of it. That is, however, a very technical ground, and I intend to base my judgment also on the larger ground that if he had stated fully the position and rules of this trades' union to which he belonged, the result would have been the same.[1]

[1] Mesisco *v.* Giuliano, 190 Mass. 352; Froelich *v.* Musicians Mut. Ben. Ass'n, 93 Mo. App. 383; Allee *v.* James, 68 Misc. 141; Smith *v.* Hollis, 33 Weekly Notes Cas. (Pa.) 485; Robertson *v.* Walker, 3 Baxt. (Tenn.) 316; Gaines *v.* Farmer, 55 Tex. Civ. App. 601; Amos *v.* Brunton, 18 N. S. W. L. R. Eq. 184. *Accord.*

DAWKINS *v.* ANTROBUS.

COURT OF APPEAL, FEBRUARY 1, 1881.

[17 *Chancery Division*, 615.]

THE action in this case was brought by Colonel *Dawkins* against the trustees and committee of the *Travellers' Club*, claiming a declaration that a resolution purporting to expel him from the club was invalid, and an injunction restraining the Defendants from excluding the Plaintiff from the club, and from interfering with him in the enjoyment of the use of the buildings and property of the club.

The Plaintiff was elected a member of the club in the year 1859.

Among the rules of the club at the time when the Plaintiff joined it were the following:

. . . . . .

"Rule 26. In case the conduct of any member, either in or out of the club-house, shall in the opinion of the committee, or of any twenty members of the club, who shall certify the same in writing, be injurious to the character and interests of the club, the committee shall be empowered (if they deem it expedient) to recommend such member to resign, and if the member so recommended shall not comply within a month from the date of such communication being addressed to him, the committee shall then call a general meeting, and if a majority of two-thirds of that meeting agree by ballot to the expulsion of such member, his name shall be erased from the list, and he shall forfeit all right or claim upon the property of the club, but his subscription for the current year shall be returned to him."

The circumstances under which the Plaintiff was expelled were shortly as follows: The Plaintiff caused to be printed and circulated a pamphlet entitled "A Farce and a Villainy — Heads I Win, Tails You Lose," in which the conduct of Lieutenant-General *Stephenson*, who was also a member of the club, was severely reflected on. A copy of this pamphlet was inclosed in a wrapper on the outside of which was printed "Dishonourable Conduct of Colonel (now Lieutenant-General) *Stephenson*," and was sent by the Plaintiff by the post to Lieutenant-General *Stephenson*, at his official address, the Guards' Orderly Room at the Horse Guards.

This having been brought to the notice of the committee of the club, they directed a letter to be written to the Plaintiff by the secretary, asking him whether an envelope with the printed heading "Dishonourable Conduct of Colonel (now Lieutenant-General) *Stephenson*," containing a printed paper headed "A Farce and a Villainy — Heads I Win, Tails You Lose," was sent by him or by his direction or authority.

On the 21st of January, 1879, the Plaintiff replied as follows: "I beg to acknowledge the receipt of your letter, dated the 17th of January,

written by the direction of the committee of the *Travellers' Club*. I request you to inform the committee that I decline to give any reply whatever to the question contained therein."

On the 14th of February the secretary wrote to the Plaintiff a letter, in which he said, "I am desired to inform you that as you have failed to give any satisfactory explanation of your conduct in answer to the request of the committee, the committee deem it their duty, in accordance with the provisions of rule No. 26, to recommend you to resign your membership of the *Travellers' Club*."

The Plaintiff not having resigned, notice was given that at a general meeting to be held on the 31st of March, 1879, it would be proposed, on behalf of the committee, to expel the Plaintiff from the club. The notice was placed in the morning-room of the club, and a copy was sent to the Plaintiff. At the meeting the resolution for expelling the Plaintiff was carried by the requisite majority, the votes being taken by ballot, and the number being 108 in favor of the resolution, and 36 against it.

The Plaintiff alleged in his statement of claim that the resolution had been come to in an unfair, capricious, and arbitrary manner, and not *bonâ fide:* that notice convening the meeting at which it was carried had not been properly given: that the 26th rule had not been properly added to the rules of the club, and was not binding on the members: and he submitted that he had not been guilty of any conduct injurious to the character and interests of the club. These charges were denied by the Defendants.

As evidence of unfairness the Plaintiff relied on the fact that of the seventeen members of the committee one was serving, and six had served, in the Brigade of Guards then under General *Stephenson's* command and four others were serving or had served in the army; and the Plaintiff alleged that the said eleven members were liable to be influenced by General *Stephenson* to be hostile to the Plaintiff.

The Master of the Rolls dismissed the action and plaintiff appealed.[1]

BRETT, L. J.:

I think we ought to take great care that this Court does not by successive decisions usurp an authority in these cases for which there is no color in point of law. In my opinion there is some danger that the Courts will undertake to act as Courts of Appeal against the decisions of members of clubs, whereas the Court has no right or authority whatever to sit in appeal upon them at all. The only question which a Court can properly consider is whether the members of the club, under such circumstances, have acted *ultrà vires* or not, and it seems to me the only questions which a Court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of a club — in other words, whether the rules of the club are contrary to natural justice; secondly, whether a

[1] The statement of facts is abridged and the opinion of Jessel, M. R., below and concurring opinions of James and Cotton, L. JJ., in the Court of Appeal are omitted.

person who has not condoned the departure from them has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bonâ fide* or not. Unless one of those charges can be made out by those who come before the Court, the Court has no power to interfere with what has been done. It seems to me the only question in the present case is upon the last matter, viz., whether what has been done is *bonâ fide*.

The Court has no right, in my opinion, to consider whether what was done was right or not, or, even as a substantive question, whether what was decided was reasonable or not. The only question is, whether it was done *bonâ fide*. Now, it is true that an element, in considering whether a matter has been done in good faith, is the question whether what has been done is really beyond all reason. If that were so it would be evidence of want of good faith; but even where that exists, it is not a necessary conclusion that there has been want of good faith, for, even after having come to the conclusion that a decision was wholly unreasonable, one might be convinced *aliunde* that nevertheless there was no malice — that what was done was done in good faith. Therefore the mere proof that it was contrary to reason is no sufficient ground for the interference of the Court. It is like the case of a malicious prosecution, where if there is a want of reasonable and probable cause, that is evidence to go to the jury to support the other necessary allegation that there was malice in fact, but then the jury are told, "even though there was a want of reasonable and probable cause, you must consider and decide for yourselves whether, besides that, there was malice in fact." Unless they find there was also malice in fact in such cases the propositions necessary for them to affirm are not made out. So, in this case, I wish to repeat, even though one were of opinion that the decision was wholly beyond reason, yet in such a case as this, considering the circumstances which are in evidence, and the persons against whom the charge is made, and the absolute absence of any evidence of indirect motive — even if I thought the decision were absolutely unreasonable — I should have declined to find the decision was contrary to good faith, and should therefore have been of opinion, even though the decision were unreasonable, that there was no ground for the interference of the Court.

The first question then is whether there was anything contrary to natural justice.[1] If a decision was come to depriving a gentleman of

[1] In Fisher *v.* Keane, 11 Ch. D. 353, Jessel, M. R., said: "In the first place I have to consider what the true construction of the rule in question is; and in the second place I have to consider whether the method adopted by the committee of putting that rule in force was such as, according to the rules of conducting judicial or quasi-judicial proceedings, ought to have been adopted. . . . Now first of all, as to the meaning of the rule, I myself entertain no doubt whatever. . . . It would be strange indeed if to decide upon the minor offence you require a committee specially summoned, while to decide upon the major offence a casual daily or weekly committee for auditing the cook's accounts, and so on, is to be considered the proper body.

his position on such a charge as must be made out here, namely, that he has been guilty of conduct injurious to the character and interests of

"That becomes all the more clear to my mind when you find this is a committee of twenty-four members, and that the ordinary quorum is three: so that the character and prospects in life of any member of this club may be irremediably blasted — for that is the result — by the decision of any three casual members of the committee who happen to walk in on a week-day, having no notice of what is about to be brought before them, but merely with the intention probably of auditing the cook's accounts, or attending to some equally trivial matter. I do not think, when you consider the substance of this rule, that there can be any question but that the grammatical reading of this section ought to be, and is, the true reading of it.

"That being so, it appears to me that the meeting of the committee on the 15th of March was not properly constituted to consider the question, and therefore that their decision is altogether invalid. But I ought not to part with the case without also giving my opinion as to the second ground of complaint.

"The second ground of complaint is this: that a committee of English officers and gentlemen — I say officers, because, having been officers in the army, they have no doubt been accustomed to sit on courts martial, and must be more familiar than ordinary English gentlemen with the proper mode of administering justice — that a committee, I say, of English gentlemen and officers in the army take upon themselves to decide *ex parte*, without notice to the member accused, and without hearing all the circumstances of the case, that his offence is, in the words of the rule, 'of so grave a character as in the interests of the club to warrant his immediate expulsion.'

"More than that, — the expulsion is to take effect 'unless twenty members of the club shall within twenty-one days demand an extraordinary general meeting, to take the conduct of the offending member into consideration.' It is said that under that part of the rule there is an appeal to a general meeting. But what appeal? The committee may have given their decision in a period of vacation, when all the members, or the great majority of them, who are friends or acquaintances of the member inculpated, may be absent abroad, or at a distance, in *Ireland* or *Scotland*, and he is unable to get twenty members together. It by no means follows that a man can get twenty members as a matter of course within any twenty-one days; and if he does, he does not appeal to an ordinary tribunal. One black ball in ten is to exclude, so that if nine-tenths of the members of that meeting shall be of opinion that the man has been unjustly expelled, the voting being by ballot, his character will still be blasted before the world at large; he will be pointed at with the finger of scorn as the officer expelled from the *Army and Navy Club* for a grave offence, which was such as — using the very words of the rule — 'to warrant his immediate expulsion,' and with no remedy in the world that I can see beyond that futile remedy which is offered by this rule.

"It does appear to me that, with such a case as this before them, English gentlemen should at once have said, 'We must hear the whole case before we decide; we must know what this officer has to say for himself, what excuse he can give in palliation of his conduct; and after having heard him, and after having taken time to consider the whole matter, we shall then decide whether we will place him in this unfortunate position.'

". . . As I said before, it does behoove the committee, who are a judicial, or quasi-judicial tribunal, to be very careful before they expose one of their fellow-members to such an ordeal. They ought to gravely consider, when proceeding to enforce such a rule as this, whether he has committed any offence at all, and especially whether he has committed such an offence as will warrant their branding him with the name of an expelled member of their club.

"In the present instance they did nothing of the kind. At a meeting, without notice, a few members only being present, they allowed two other gentlemen, behind the back of the Plaintiff, to make a statement as to what he said and did in the

the club, in my opinion there would be a denial of natural justice if a decision was come to without his having an opportunity of being heard.

Now, in my opinion, the charge made against the Plaintiff from beginning to end was the sending the envelope through the public post to an officer in command of a regiment, on the outside of which envelope was "Dishonourable Conduct of General *Stephenson*." That was the charge. It is true that the fact of the pamphlet being inside was mentioned, but in this case that was not the material charge; that might have been a charge in other cases, and a very fair charge, in my opinion; but in this case the substance of the charge from beginning to end was the sending the envelope. In the first letter he is informed, "We are told you have sent an envelope; we want you to answer whether that is true or not"? The gentleman will not answer, but says, "I request you to inform the committee that I decline to give any reply." They do not take that as conclusive, but they enter upon the inquiry. They have a letter in his own handwriting before them; they do that which was lawful and legitimate — they compare that with the writing on the envelope to General *Stephenson*, and they say, "We come to the conclusion it is your handwriting." They do more. They then send a letter to Colonel *Dawkins* to say we have come to a conclusion, *primâ facie* no doubt, but they say having done this we ask you "Will you give any explanation"? Then he says, "I deny your jurisdiction to ask me." That is telling them he will not be a party to their inquiry. It is refusing to give any explanation. It is a direct refusal to go before them, and after

billiard-room on the night in question. They had nothing before them on his part except the copy of a letter of apology, which he had sent to the gentleman whom he had insulted, which did not state the facts, but merely stated that he had used a foolish and insulting expression, which he desired to withdraw at the earliest possible opportunity."

In Labouchere *v.* Earl of Wharncliffe, 13 Ch. D. 346, Jessel, M. R., said: "What ought the committee of a club to do when the conduct of one of its members has been impugned? They ought to see what that conduct has been, and what excuse or reason can be given by the member for it; and they ought to give notice to that member that his conduct is about to be inquired into, and afford him an opportunity of stating his case to them. . . . In a case where a decision depended upon their opinion — in other words, upon their judgment — it was most important that the materials on which that judgment was formed should be accurately ascertained; and, of course, that could only be done by a proper investigation, by giving due notice to the accused, and by taking — I do not say legal evidence, or that evidence not strictly legal might not be admissible — but by taking evidence on the question of fact before them, and satisfying themselves as to the truth. They could then form their opinion. That was not done in the present case; and, in my view, the committee have not followed in substance their own rule at all. The judgment of a committee, with the facts of a case fully before them, might be right or it might be wrong. With that the Court has nothing to do. If, having given the accused fair notice, and made due inquiry, the committee came to the conclusion that the conduct of one of the members of the club was injurious to its welfare and interests, no judicial tribunal could interfere with any consequences which might arise from an opinion thus fairly formed."

that it seems to me he had ample opportunity of explaining that which was in terms told to him to be a charge against him. Therefore in this case there was no want of natural justice. In my opinion he had ample opportunity before the general meeting of giving an explanation, if he chose, as to the sending that envelope, but he declined to give any explanation whatever.

Then it was urged that this matter was not carried out according to the rules, and the first ground taken was that the rule under which it was done was a void rule, because the rule had not been properly passed. I agree with the Master of the Rolls entirely in his reasoning, that the rule was properly passed. But then it was said that this was not done according to the rule, because it was said the rule had been acted upon in a sense of being applied to matters which had occurred before it was passed. The answer is, it was not so applied. It is quite true the rule ought not to be applied to matters which had happened before the rule was passed; but it was not so, it was only applied to a matter which had happened after it was passed, therefore that objection fails.

Then it was said there was malice in fact, and that the Master of the Rolls is wrong in holding there was no malice in fact. That was put upon two grounds. It was suggested — it seems to me wantonly, improperly and indefensibly — by insinuation, and not by direct assertion, that the gentlemen whose names are here put forward as the Defendants in this case, had allowed themselves to be actuated by subservience to higher authority, and that they had come to a conclusion which they did not believe to be true, because they were dealing with matters affecting authorities at the Horse Guards. It is said that counsel do not suggest such things unless so instructed. All I can say is, there is not the slightest evidence to support such a suggestion. If such a suggestion had been made before me, where it would have been my duty to consider whether such a question should have been left to a jury, I should have said there is not a semblance of such evidence, and, therefore, those who have instructed counsel to make such a suggestion have done that which is contrary to every known sense of propriety.

Then it was said there is a want of reason in the decision, and upon that the Master of the Rolls ought to have determined there was malice in fact. It seems to me that raises this proposition — Can the Court say that no reasonable men could have come to the decision that to send such an envelope to an officer in command of his regiment to his orderly room in the barracks where he has command — I care not whether he was a member of the club or not — could not reasonable men come reasonably to the conclusion that to do such a thing as that was scandalous, ungentlemanly, and inconsistent with the character and proper conduct of an officer and a gentleman? In my opinion reasonable men could come to such a conclusion. And if they have come to the conclusion that the conduct of a member of a club has been scandalous, ungentlemanly, and contrary to the proper conduct of an officer and a

gentleman, it seems to me he cannot complain of their going further, and saying such conduct is injurious to the character and interests of the club.

Therefore I see no grounds for saying this is not a reasonable decision; but I wish to say further, if I thought it an unreasonable decision I should have declined to come to the conclusion that there was any malice or want of good faith in those who decided it.[1]

[1] Cf. Cassel *v.* Inglis [1916] 2 Ch. 211; Weinberger *v.* Inglis [1918] 1 Ch. 517, [1919] C. A. 606. The American cases are in accord. (1) Rules or proceedings against natural justice, e. g., expulsion without notice or without fair notice. Harris *v.* Aiken, 76 Kan. 516 (*semble*); Loubat *v.* Le Roy, 40 Hun, 546; People *v.* Hoboken Turtle Club; 60 Hun, 576; People *v.* Uptown Ass'n, 9 App. Div. 191; People *v.* Independent Dock Builders' Benevolent Union, 164 App. Div. 267 (*semble*); Williamson *v.* Randolph, 48 Misc. 96; Bachman *v.* Harrington, 52 Misc. 26; Grassi Bros. *v.* O'Rourke, 153 N. Y. Suppl. 493; Metropolitan Base Ball Ass'n *v.* Simmons, 17 Phila. 419. See also Meyers *v.* Casey, 12 Com. L. R. 90.

(2) Expulsion in violation of rules. Wilson *v.* Pine Knot Council, 175 Ky. 502; White *v.* Brownell, 2 Daly, 329; People *v.* Greenwood Lake Ass'n, 63 Hun, 633; Barry *v.* The Players, 147 App. Div. 704, aff'd 204 N. Y. 669; People *v.* Independent Dock Builders' Benevolent Union, 164 App. Div. 267 (*semble*); Miller *v.* Builders' League, 29 App. Div. 630; Kopp *v.* White, 30 Civ. Proc. R. 352 (*semble*); Connell *v.* Stalker, 21 Misc. 609; Stein *v.* Marks, 44 Misc. 140; Evans *v.* Philadelphia Club, 50 Pa. St. 107; Manning *v.* Klein, 11 Pa. Co. Ct. R. 525; Stefanizzi *v.* Mutual Ben. Soc. 91 Vt. 538; State *v.* Seattle Baseball Ass'n, 61 Wash. 79; Bartlett *v.* Bartlett & Son Co., 116 Wis. 450.

Contra, that the club is the judge of its own proceedings. People *v.* St. George's Society, 28 Mich. 261.

Where violation of rules is claimed, the expelled member must first exhaust his remedy within the association. Levy *v.* Magnolia Lodge, 110 Cal. 297; Engel *v.* Walsh, 258 Ill. 98; Hatfield *v.* De Long, 156 Ind. 207; Oliver *v.* Hopkins, 144 Mass. 175; Olery *v.* Brown, 51 How. Pr. 92; Allee *v.* James, 68 Misc. 141; Zilliax *v.* I. O. F., 13 Ont. L. R. 155. *Aliter*, where the remedy within the association is not adequate because of infrequent meeting of the reviewing body. Fritz *v.* Knaub, 103 N. Y. Suppl. 1003, aff'd 124 App. Div. 915. Or where the association is acting wholly outside of its powers. Mulroy *v.* Knights of Honor, 28 Mo. App. 463; Rueb *v.* Rehder, 24 N. M. 534; Fales *v.* Musicians' Union, 40 R. I. 34.

(3) Malicious expulsion. Swafford *v.* Keaton (Ga. App.) 98 S. E. 122; Harris *v.* Aiken, 76 Kan. 516 (*semble*); Froelich *v.* Musicians Mut. Ben. Ass'n, 93 Mo. App. 383 (*semble*); Loubat *v.* Le Roy, 15 Abb. N. C. 1 (*semble*); Barry *v.* The Players, 73 Misc. 10 (*semble*).

If the rules are not against natural justice and the proceedings are not in violation of the rules and are not malicious, the action of the club or of its committee will not be reviewed on the merits. U. S. *v.* Metropolitan Club, 11 App. D. C. 180; Spilman *v.* Supreme Council, 157 Mass. 128; Richards *v.* Morison, 229 Mass. 458; Brandenburger *v.* Jefferson Club, 88 Mo. App. 148; Austin *v.* Dutcher, 56 App. Div. 393; People *v.* Independent Dock Builders' Benevolent Union, 164 App. Div. 267; Williamson *v.* Randolph, 48 Misc. 96; Grassi Bros. *v.* O'Rourke, 153 N. Y. Suppl. 493; Com. *v.* Union League, 135 Pa. 301; Dodd *v.* Armstrong, 18 Phila. 399; Bauer *v.* Seegar, 2 Weekly Notes Cas. (Pa.) 242.

WELLENVOSS *v.* THE GRAND LODGE OF KNIGHTS OF PYTHIAS OF KENTUCKY.

COURT OF APPEALS, KENTUCKY, APRIL 16, 1898.

[103 *Kentucky*, 415.]

JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

THE appellants, Henry Wellenvoss and Uhland Lodge No. 4 Knights of Pythias of Louisville, Ky., by this proceeding in the circuit court sought a mandatory injunction against appellees Thos. B. Matthews, Grand Chancellor of the Grand Lodge of the Knights of Pythias of Kentucky and the Grand Lodge of the Knights of Pythias of Kentucky, commanding Matthews, as Grand Chancellor to impart to appellant Wellenvoss the pass-word of the Grand Lodge and commanding the Grand Lodge to receive Wellenvoss into its body and to permit him to participate in its deliberations as a regular authorized delegate of appellant Uhland Lodge, at the regular session of that body at Somerset, Ky., in September, 1895.

The petition alleges that appellant Wellenvoss is a member of Uhland Lodge in good standing and has been since 1869, and that Uhland Lodge is a member in good standing of appellee Grand Lodge, and as such member is entitled to representation in the deliberations of said body, as well as to all the rights and privileges pertaining thereto, and in accordance with its rights had selected and commissioned appellant Wellenvoss as its representative to the Grand Lodge and that appellees had wrongfully and without right or authority excluded appellant Wellenvoss from its deliberations. . . .

By the allegations of the petition, there is no right of property involved, the only right claimed to have been violated is the social right of Wellenvoss to participate in the deliberations of the Grand Lodge and the right of Uhland Lodge to have representation. It is not alleged that appellee Grand Lodge absolutely refused Uhland Lodge representation, but taking the pleading in its usual way, most strongly against the pleader, the only denial by the Grand Lodge was the right of Wellenvoss to represent Uhland Lodge; which was not a property or civil right but only social.

. . . . . .

By this action the chancellor is asked to compel the proper officer of a secret benevolent society to impart to a person the secret pass-word that will admit that person to the meetings. This is sought because it is alleged, and for the purposes now will be taken as true, that if appellant Wellenvoss be not admitted great and irreparable injury will be done, both to Wellenvoss and Uhland Lodge.

It is alleged that Wellenvoss pays dues to Uhland Lodge and that Uhland Lodge pays dues to the appellee, the latter being its pro rata

of the legitimate expenses of appellee. We are of opinion that there is no right of property involved. It is not alleged that by the denial of appellee to admit Wellenvoss to its councils, that appellant Uhland Lodge will lose any right of property or be endangered in any right of property. It is not alleged that appellee is possessed of any property in which appellant Uhland Lodge has an interest.

It is not alleged that by the failure of Wellenvoss to gain admittance to the appellee as the representative of Uhland Lodge that he will lose any rights of property either in the Grand Lodge, or in Uhland Lodge.

The allegation that Wellenvoss pays dues to appellant Uhland Lodge and that lodge to appellee and that both bodies are chartered benevolent societies does not of itself state such rights of property as would authorize the chancellor to interfere because of the alleged violation of property rights. There should be some allegation showing that there is property or funds in the hands of the society in which a party is directly interested before he can ask the aid of the court for relief. We are referred to no case that has ever held that it was within the province of a court of equity to compel by any process that the secret pass-word or secret work of any social or benevolent society be imparted to a person. On the contrary it has been held repeatedly by this court that courts of equity cannot revise or question ordinary acts of church discipline, and in the case of *Schmidt* v. *Lodge*, 84 Ky. 190, this court said: "The chancellor will not or cannot restore him to membership or require that he shall be permitted to attend their stated meetings."

We are of opinion that as no right of property is involved, that the chancellor could not interfere with the social relations of this society and therefore properly denied the mandatory injunction.

Judgment affirmed.[1]

BAIRD v. WELLS.

IN THE CHANCERY DIVISION, MARCH 7, 1890.

[44 *Chancery Division*, 661.]

STIRLING, J.:

THIS is a motion to restrain the Defendants from excluding the Plaintiff from the use and enjoyment of the *Pelican Club*, of which the Plaintiff was threatened to be deprived in consequence of a decision of the committee of the club. In cases similar to the present the Court, as has been repeatedly held, does not undertake to act as a Court of Appeal from the decisions of the committees of clubs: *Fisher* v. *Keane*, 11 Ch. D. 353; *Labouchere* v. *Earl of Wharncliffe*, 13 Ch. D. 346; *Dawkins*

[1] Parts of the opinion are omitted.

Mead *v.* Stirling, 62 Conn. 586 (injunction against suspension of an officer in a masonic lodge denied); Heaton *v.* Richmond (Mass.) 42 Am. Law Rev. 178 (injunction against discontinuance of a chapter of a college fraternity denied); Hershiser *v.* Williams, 24 Weekly Law Bull. 314, 6 Ohio Cir. Ct. R. 147. *Accord.*

Heaton *v.* Hall, 28 Misc. 97, 51 App. Div. 126 *Contra.*

v. *Antrobus*, 17 Ch. D. 615. The only questions which this Court can entertain are: first, whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to *bonâ fide*. I propose to inquire into these matters in the first place, reserving for consideration hereafter a further question, viz., whether the decisions to which I have referred apply to a club constituted as the present is.

[The court here discussed the rules of the club and the action of the committee, and proceeded.]

I am, therefore, of opinion, first, that the decision complained of was not that of a committee duly elected according to the rules of the club, and secondly, that it is open to serious question whether the resolution of the 29th of January can be regarded as representing the unbiased judgment of the committee after fairly hearing the Plaintiff.

The question then arises, whether this case falls within the class of cases in which the Court grants relief by way of injunction. In all the cases of this nature, in which up to the present time an injunction has been granted, the club has been one of the ordinary kind, *i. e.*, it has been possessed of property (such as a freehold or a leasehold house, furniture, books, pictures, and money at a bank), which was vested in trustees upon trust to permit the members for the time being to have the personal use and enjoyment of the club-house and effects in and about it. But the interest of the members is not confined to that purely personal right. The members might, if they all agreed, put an end to the club; and in that case they would be entitled, after the debts and liabilities of the club were satisfied, to have the assets divided among them. In the present case the club, as such, has no property. The club-house and furniture belong to the Defendant *Wells*, and by him the subscriptions are taken. He is not a trustee, but the owner of the property. If the club were dissolved at any moment there would be nothing whatever to divide among the members. Now the interference of the Court in the cases which have hitherto occurred has been based on the rights of property of which the member had been improperly deprived. The general principle was laid down by Lord *Cranworth* in the case of *Forbes* v. *Eden*, Law Rep. 1 H. L., Sc. 568, where he said, *Ibid.* 581: "Save for the due disposal and administration of property, there is no authority in the Courts of either *England* or *Scotland* to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs." And the same principle was stated at greater length by the late Master of the Rolls (Sir *George Jessel*) in the case of *Rigby* v. *Connol*, 14 Ch. D. 482. . . .

Here, as I have pointed out, there are no funds vested in trustees or settled to be disposed of by the members of the *Pelican Club*, in accordance with the rules of that association, and the question is whether the Plaintiff, as a member of that club, has any right of property for the protection of which the Court will interfere by way of injunction —

and in my judgment he has not. The position appears to me to be this: each member is entitled by contract with the Defendant *Wells* to have the personal use and enjoyment of the club, in common with the other members, so long as he pays his subscription and is not excluded from the club under rule 17. That right is, as it seems to me, of a personal nature such as, if infringed, may give rise to a claim for damages, but not such as the Court will enforce by way of specific performance or injunction. The contract in its legal nature closely resembles contracts for providing board and lodging in a particular house, as when the head of a household admits a boarder into his family for a fixed period, or the proprietor of a private boarding-house agrees to provide for a term board and lodging for one boarder in common with others; as to which *Wright v. Stavert*, 2 E. & E. 721, may be referred to. The contracts in these cases fall, in my opinion, under the head of agreements strictly personal in their nature, and consequently in neither of them would the Court interfere by way of injunction at the instance of the boarder. So also, in my judgment, is it in the present case. It was contended that damages might be an insufficient remedy by reason of a decision being given which affects the character and position in society of the Plaintiff and does not satisfy the requirements of the law. In no case, so far as I am aware, has the existence of such circumstances been treated as affording ground for the granting of an injunction to restrain the proceedings of a voluntary society, and indeed, upon the principle laid down in the case of *Forbes* v. *Eden*, Law Rep. 1 H. L., Sc. 568, it might well happen that decisions which gravely affect some members of a voluntary society and do not satisfy the requirements of the law, might be arrived at by the committee or other like body without being open to be questioned in any civil Court or giving rise to any right of action whatever. Under these circumstances, I make no order on the motion.[1]

[1] The plaintiff having appealed from the order denying an injunction, the following proceeding took place in the Court of Appeal:

"1890. April 23. Sir Horace Davey, Q. C. (Sir C. Russell, Q. C., and Ernest de Witt, with him), appeared for the appellant, and stated that, as the judgment of Mr. Justice Stirling had been in favor of the Plaintiff as regarded the irregularity of the proceedings of the Defendants, the Plaintiff had no wish to continue in the club, and would now assent to an order dismissing the appeal with costs."

"Order made accordingly." (44 Ch. D. 677.)

Manning *v.* San Antonio Club, 63 Tex. 166; Rowe *v.* Hewitt, 12 Ont. L. R. 13. *Accord.*

KRAUSE *v.* SANDER.

SUPREME COURT, NEW YORK, MARCH, 1910.

[66 *Miscellaneous Reports*, 601].

ACTION against a voluntary unincorporated association for reinstatement as member thereof.

BLACKMAR, J. The plaintiff by this action appeals to this court to reinstate him in membership in the Brewers' Union, No. 69, of the International Union of the United Brewery Workmen of America, from which organization he claims he was unlawfully expelled.

The defendant is a voluntary unincorporated organization. Its constitution constitutes a contract between the members which defines their rights and obligations. On the principle of novation, new members are admitted to privity of contract; and provision is also made for the voluntary withdrawal and expulsion of members. The provisions for expulsion are part of the contract of membership and binding on all members. If a member is expelled in conformity with these provisions, the contract is not broken and no right of the member so expelled has been violated; but if the expulsion is not in accordance with the contract the rights of the expelled member are violated, in this respect the contract is broken, and he may maintain an action in equity to specifically enforce it by reinstating him and protecting him in his right of membership by appropriate decree. The plaintiff claims that his expulsion was not in accordance with the contract of membership.

The contract prescribes the causes for which a member may be expelled and in part the method of procedure. Every member agrees, when he joins the organization, that he may be expelled for a cause and in the manner provided by the contract of membership. The inquiry, therefore, will be whether plaintiff was expelled for a cause and in the manner prescribed in the contract.

The cause for plaintiff's expulsion was that he secured admission into the organization with a forged certificate and under false representations. The causes for expulsion stated in the constitution are as follows: Strike breaking, embezzling of moneys from a union, repeated denunciation of co-workers to superiors or employers, perversion of facts involving co-workers, blackmailing or denunciation of officers, and "such other acts which tend to the injury of the members or the International Union."

The significance of the complaint against plaintiff is seen in the fact that, by other provisions of the constitution, membership was offered to every candidate proving himself a brewer of honorable character and in possession of his first or second citizen paper. These provisions are praiseworthy and important as safeguarding the membership and confining it to those who have an interest in its purposes, who having applied

for citizenship are interested in maintaining the laws and institutions of the country and whose character is honorable. The committee looks to the candidate himself to furnish proof on this point; and it is a gross violation of good faith to the organization and its members for an applicant to gain admission by forged certificates and false representations as to his history, condition or character. I hold, therefore, that the cause of expulsion assigned was sufficient, in that it was an act which tended to the injury of the members or the International Union. This seems to me too plain for argument.

The question remains whether the proceedings were regular. When a member of an unincorporated association agrees by valid contract that the association may expel him for specified causes, he by necessary implication consents that the association may determine whether such causes exist. This is also involved in that clause of the union's constitution which provides: "Every defendant must receive an impartial and just trial." This means that he shall have fair notice of the charge alleged against him, a reasonable opportunity to be heard, and that the triers shall act impartially after hearing whatever may be alleged in his defence. In other words, he consents that the proceeding shall be judicial in its nature; and the determination, if regular and the cause assigned such as is prescribed in the membership contract, shall be final and conclusive. In this case the proceedings are, in a measure at least, prescribed in the contract. Section 2 of article 5 of the defendant's constitution provides as follows: "Expulsion can only take place in a special meeting, with a two-third majority."

The complaint was made at a meeting at which plaintiff was present. A committee of inquiry was appointed with the personnel of which plaintiff expressed himself satisfied. The written complaint with a notice of the time and place of the meeting of this investigating committee was served upon him. He attended the meeting of the committee. Evidence of the truth of the charge was taken and the committee made a report that the charge was sustained. A special meeting of the order was called at which plaintiff attended; the report of the committee was presented; the plaintiff was given full opportunity of being heard, and thereafter the question on his expulsion was put, tellers were appointed, and a vote taken. Up to this point there can be no question of the regularity of the proceedings. The plaintiff, however, claims that he was not expelled "by a two-third majority." There were upward of 250 members present; and, when the vote was counted, it was found that 128 had voted for expulsion and none against it. Was there a two-thirds majority within the meaning of the contract? It was worthy of note that this claim is not made in the complaint. The point was raised by the court who asked the secretary then on the stand how many were present at the meeting. He answered that the roll was not called but that in his judgment more than 250 members were present. The plaintiff then asked to amend his complaint and, with the acquiescence

of the defendant, as I recall it, for I have not the minutes before me, the motion was granted and the answer also amended by denying this allegation. I shall, therefore, treat the point as being in the case.

The rule of law, as I understand it, is that, when the determination of a question is committed to a board or committee of definite numbers who act by delegated powers under a provision that their act shall be by a majority or two-thirds, this means a majority or two-thirds of all the members of the board or committee. *Loubat* v. *Le Roy*, 40 Hun, 546. But where the decision of a question is committed to a body of undefined numbers who act by original and not delegated powers, a majority or two-thirds means a majority or two-thirds of those who participate in the election. *May* v. *Bermel*, 20 App. Div. 53. In the case at bar the determination was to be by the organization itself, acting at a special meeting. The rule above stated would, therefore, permit of the determination of the question by two-thirds of those voting. The provision of the contract for a two-thirds majority was made to prevent expulsion by a majority vote only and is, I think, satisfied if the expulsion was by two-thirds of those voting. The plaintiff was present, made no claim that the vote was not sufficient, and took an appeal to the executive board of the International Union with which Union 69 was affiliated, by which body the act of the local union was affirmed.

I decide, therefore, that the cause for expulsion was among the causes prescribed by the contract; that the remedy within the association was exhausted, and that the proceedings were regular.

Judgment for the defendant, with costs.[1]

[1] Affirmed without opinion, 143 App. Div. 941. Cf. Kelly *v.* National Society of Operative Printers, 113 Law Times R. N. S. 1055. Here, if the case were treated as one of enjoining a breach of contract, it would run counter to the Trade Union Act (1871), 34 & 35 Vict. c. 31; but if treated as a suit to enjoin a tort, the Trade Disputes Act (1206), 6 Ed. 7, c. 47, s. 4 might be in the way.

In Lawson *v.* Hewell, 118 Cal. 613, Harrison, J., says: "Individuals who associate themselves in a voluntary fraternal organization may prescribe conditions upon which membership in the association may be acquired, or upon which it may continue, and may also prescribe rules of conduct for themselves during their membership, with penalties for their violation, and the tribunal and mode in which the offences shall be determined and the penalty enforced. These rules constitute their agreement, and unless they contravene some law of the land are regarded in the same light as the terms of any other contract. Organizations of this character are not recognized as legal bodies, or as entitled to recognition in courts for the enforcement of their rules, unless there is also involved the determination of some civil right, or some right of property, and in these cases courts are limited to inquiring whether the rules prescribed by the organization for the determination of the right have been followed. In all matters of policy, or of the internal economy of the organization, the rules by which the members have agreed to be governed constitute the charter of their rights, and courts will decline to take cognizance of any matter arising under these rules. Whether the rules have been violated, or whether a member has been guilty of conduct which authorizes an investigation by the association or the imposition of the penalty prescribed by it, is eminently fit for the association itself to determine, and, if the investigation is in accordance with its rules, the party charged has no ground of complaint, since it is but carrying into effect the agreement he made when he became a

FLETCHER *v.* TUTTLE.

SUPREME COURT, ILLINOIS, JUNE 15, 1894.

[151 *Illinois*, 41.]

Two suits, one by a legal voter and the other by a candidate for election to the legislature, against the county clerk to enjoin issuance of notices of election under an invalid apportionment act whereby a county was unlawfully excluded from the legislative district, so that the voters of the county would be deprived of the opportunity of casting their votes for members of the legislature and the plaintiff who was a candidate would be deprived of his right to be voted for by the legal voters of the district. The lower court dismissed the suits one upon demurrer, the other after a hearing upon the pleadings.[1]

PER CURIAM: From the foregoing statement of these two bills it seems to be perfectly plain that the entire scope and object of both is the assertion and protection of political, as contradistinguished from civil, personal or property rights. In both the complainant is a legal voter, and a candidate for a particular elective office, and by his bill he is seeking the protection and enforcement of his right to cast his own ballot in a legal and effective manner, and also his right to be such candidate, to have the election called and held under the provisions of a valid law, and to have his name printed upon the ballots to be used at such election, so that he may be voted for in a legal manner. The rights thus asserted are all purely political. Nor, so far as this question is concerned, is the matter aided in the least by the attempt made by the complainant in each bill to litigate on behalf of other voters, or of the people of the State generally. The claims thus attempted to be set up are all of the same nature, and are none the less political.

As defined by Anderson, a civil right is "a right accorded to every member of a distinct community or nation," while a political right is a "right exercisable in the administration of government." Anderson's Law Dict. 905. Says Bouvier: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establish-

member of the association. 'When men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject themselves to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for that society to know its own.' (State *v.* Odd Fellows' Grand Lodge, 8 Mo. App. 148. See, also, Niblack on Voluntary Societies, sec. 113; White *v.* Brownell, 2 Daly, 329; Mead *v.* Sterling, 62 Conn. 586.)"

[1] A brief statement of facts has been substituted and parts of the opinion discussing the suits as taxpayer's bills to enjoin waste of public moneys are omitted.

ment, support or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of his civil rights, — which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil rights." 2 Bouv. Law Dict. 597.

The question then is, whether the assertion and protection of political rights, as judicial power is apportioned in this State between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity. In *Sheridan* v. *Colvin*, 78 Ill. 237, this court adopting in substance, the language of Kerr on Injunctions, said: "It is elementary law, that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the protection of rights of property."

In that case, the police commissioners of the city of Chicago filed their bill in chancery against the mayor, the members of the common council, and certain other officers of the city, to restrain the enforcement of a city ordinance reorganizing the police force of the city and depriving the complainants of their functions as police commissioners, it being claimed that the common council had no power to pass the ordinance, and that it was consequently void. It was held that the rights which were thus sought to be protected and enforced were purely political, and that a court of chancery, therefore, had no jurisdiction to interfere with the passage or enforcement of the ordinance.

In *Dickey* v. *Reed*, 78 Ill. 261, a bill in chancery was filed by the state's attorney of Cook county and five taxpayers of the city of Chicago, to restrain the members of the common council of the city and the city clerk from canvassing the returns of the election held in the city April 23, 1875, upon the question whether the city would become incorporated under the General Incorporation act. It was claimed that the election, for certain reasons, was void, and also that gross frauds had been perpetrated at the election, by depositing a large number of ballots in the ballot-boxes which had not been cast by the voters, and that a large

number of illegal and fraudulent votes in favor of organization had been cast, and that various other irregularities, having the effect of invalidating the election, had intervened. A preliminary injunction having been awarded, it was disregarded by the city officers, who proceeded, notwithstanding, to canvass the vote and declare the result. Various of the city officers and their advisers were attached and fined for contempt, and on appeal to this court from the judgment for contempt, it was held that the matter presented by the bill was a matter over which a court of chancery had no jurisdiction, and that the injunction was void, so that its violation was not an act which subjected the violators to proceedings for contempt.

In *Harris* v. *Schryock*, 82 Ill. 119, it was held that the power to hold an election is political and not judicial, and that a court of equity has no jurisdiction to restrain officers from the exercise of such powers. And it was said that this was in accordance with repeated decisions of this court, and in support of that statement, *People* v. *City of Galesburg*, 48 Ill. 485; *Walton* v. *Develing*, 61 *Id.* 201; *Darst* v. *The People*, 62 *Id.* 306, and *Dickey* v. *Reed, supra*, are cited. So in *Delahanty* v. *Warner*, 75. Ill. 185, it was held that a court of equity has no jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a party from office and appointing a successor, and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete by *quo warranto* against the successor, or by *mandamus* against the mayor and councilmen.

In *State of Georgia* v. *Stanton*, 6 Wallace, 50, a bill was filed by the State of Georgia against the Secretary of War and other officers representing the executive authority of the United States, to restrain them in the execution of the acts of Congress known as the Reconstruction acts, on the ground that the enforcement of those acts would annul and totally abolish the existing State government of the State, and establish another and different one in its place, and would, in effect, overthrow and destroy the corporate existence of the State, by depriving it of all means and instrumentalities whereby its existence might and otherwise would be maintained; and it was held that the bill called for a judgment upon a political question, and that it would not, therefore, be entertained by a court of chancery. And it was further held that the character of the bill was not changed by the fact that, in setting forth the political rights sought to be protected, it averred that the State had real and personal property, such, for example, as public buildings, etc., of the enjoyment of which, by the destruction of its corporate existence, the State would be deprived, such averment not being the substantial ground of the relief sought.

In re Sawyer et al., 124 U. S. 200, it was held that the Circuit Court of the United States had no jurisdiction to entertain a bill in equity to restrain the mayor and committee of a city in Nebraska from removing a city officer, upon charges filed against him for misfeasance in office,

and that an injunction issued on such bill, as well as an order committing certain persons for contempt in disregarding the injunction, was absolutely void. In that case the court say: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offences, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government." In support of its decision, the court cites, among various other cases, the decisions of this court in *Delahanty* v. *Warner*, *Sheridan* v. *Colvin*, and *Dickey* v. *Reed*, above referred to, and quotes with approval the passage in the opinion in *Sheridan* v. *Colvin* above set forth, taken in substance from Kerr on Injunctions.

Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that, wherever the established distinctions between equitable and common law jurisdiction are observed, as they are in this State, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery can not, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery.

The only decision to which we are referred, in which relief of the character of that sought in this case was given in what was in substance an equitable proceeding, is *State* v. *Cunningham*, 83 Wis. 90. That was an original proceeding, brought in the Supreme Court of Wisconsin, to test the validity of an apportionment law passed by the legislature of that State, dividing the State into legislative districts. An injunction was prayed to restrain the Secretary of State from publishing notices of an election of members of the senate and assembly in the legislative districts attempted to be created by the act, and from filing and preserving in his office certificates of nomination and nomination papers,

and from certifying the same to the several county clerks. The court entertained jurisdiction of the proceeding, and on final hearing awarded a perpetual injunction, as prayed for.

We have carefully considered the case as reported, and if we understand it correctly, it can not, in our opinion, be regarded as an authority in favor of equity jurisdiction in the case before us. In this connection it may be borne in mind, as a matter of some importance, that the Wisconsin code of procedure attempts to abolish the distinction between actions at law and in equity; but as to precisely how far that statutory provision has been held to have broken down the distinctions between common law and equitable remedies, we do not pretend to be accurately advised. But whether that distinction is held to remain practically unaffected by the statute or not, it appears from the opinion of the court that its jurisdiction to grant a remedy by injunction in that case was based solely upon that provision of the Constitution of Wisconsin which gives to the Supreme Court jurisdiction "to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same." In construing this provision of the Constitution, the court holds that these various writs, and injunction among them, are prerogative writs, and that the Supreme Court is thereby given original jurisdiction in all judicial questions affecting the sovereignty of the State, its franchises and prerogatives, or the liberty of the people, and that injunction and *mandamus* are thereby made correlative remedies, so as to authorize resort to injunction to restrain excess of action, in the same class of cases where *mandamus* may be resorted to for the purpose of supplying defects. Thus the court, in the opinion, quoting the language of a former decision, in which this constitutional provision is construed, say: "And it is very safe to assume that the Constitution gives injunction to restrain excess in the same class of cases as it gives *mandamus* to supply defect; the use of the one writ or the other in each case turning solely on the accident of overaction or shortcoming of the defendant. And it may be, that where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose." And again: "Inasmuch as the use of the writ of injunction, in the exercise of the original jurisdiction of this court, is correlative with the writ of *mandamus*, the former issuing to restrain where the latter compels action, it is plain that this case, as against the respondent, is a proper one for an injunction to restrain unauthorized action by him in a matter where his duties are clearly ministerial, and affect the sovereignty, rights, and franchises of the State, and the liberties of the people."

It thus seems plain that, in view of the construction of the Constitution of Wisconsin, adopted by the Supreme Court of that State, the prerogative writ of injunction, of which that court is given original jurisdiction,

is a writ of a different nature, and having a different scope and purpose from an ordinary injunction in equity. Where the established distinctions between equity and common law jurisdiction are observed, injunction and *mandamus* are not correlative remedies, in the sense of being applicable to the same subject matter, the choice of the writ to be resorted to in a particular case to depend upon whether there is an excess of action to be restrained or a defect to be supplied. The two writs properly pertain to entirely different jurisdictions and to different classes of proceedings, injunction being the proper writ only in cases of equitable cognizance, and *mandamus* being a common law writ, and applicable only in cases coming within the appropriate jurisdiction of courts of common law. Besides, it would seem that in Wisconsin the writ of injunction, of which the Supreme Court is given original jurisdiction, is not limited, as is the jurisdiction of courts of equity, to cases involving civil or property rights, but may be resorted to in all cases "affecting the sovereignty of the State, its franchises or prerogatives, or the liberties of the people," thus including within its scope the protection of political as well as civil or property rights. It thus seems plain that *State* v. *Cunningham* was decided under a judicial system differing essentially from ours, and that it cannot be resorted to as an authority upon the question of the jurisdiction of courts of equity in this State in cases of this character. . . .

After giving the cases patient consideration, we are unanimously of the opinion that these bills present no cases entitling the complainants to relief in a court of equity. Having reached that conclusion, it is unnecessary for us to express any opinion upon any other question raised by counsel in their arguments, but upon the sole ground that the cases made by the bills are not within the jurisdiction of a court of equity, the decrees of the courts below dismissing the bills for want of equity will be affirmed.

Decree affirmed.[1]

[1] Giles *v.* Harris, 189 U. S. 475; Green *v.* Mills, 69 Fed. 852; State *v.* Aloe, 152 Mo. 466; Winnett *v.* Adams, 71 Neb. 817; Howell *v.* Bee Publishing Co. 100 Neb. 39. *Accord.*

Gilmore *v.* Waples, 108 Tex. 167. *Contra.*

In Winnett *v.* Adams, Albert, C., says (p. 825): "Notwithstanding the array of authorities which support it, we should not care to commit ourselves unqualifiedly to the doctrine that a court of equity will not under any circumstances interfere for the protection of political rights. But, we think it is perfectly safe to adopt the doctrine to the extent of holding that a court of equity will not undertake to supervise the acts and management of a political party, for the protection of a purely political right. We do not overlook the fact that primary elections have become the subject of legislative regulation, and it may be conceded that each member of a political party has a right to a voice in such primaries, and to seek nomination for public office at the hands of his party. But, when he is denied these rights, or unreasonably hampered in their exercise, he must look to some other source than a court of equity for redress. To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbitrator between contesting

KEARNS *v.* HOWLEY.

SUPREME COURT, PENNSYLVANIA, OCTOBER 17, 1898.

[188 *Pennsylvania*, 116.]

OPINION BY MR. JUSTICE DEAN:[1]

THE members of the democratic county committee of Allegheny county by the rules of the party are elected at the primary elections on the last Saturday of August in each year. By Rule VII. the election officers must certify the vote for each candidate to the executive committee of each ward, borough and township, and also to the chairman of the county committee. The election of the delegates who are to compose the county convention to nominate candidates for county offices are elected at the same time, and the convention meets the following Monday or Tuesday. Rule VII. having provided for certification of the vote to the county chairman, Rule VIII. provides that "a list of the county committee so elected shall be prepared by the chairman, and announced at the county convention." By Rule X. the county committee so chosen must meet the first Monday of April following, and elect a chairman to serve for the ensuing year. The defendant, Joseph Howley, had been elected chairman on the first Monday of April, 1897, and therefore was chairman in August of that year at the county convention. He announced the members elect to the county committee, so far as returns had been received. Quite a number of districts had not certified the election of members of the committee; these were announced as vacancies, to the number of 258, out of a roll of 521. The chairman, Howley, at the proper time, called a meeting of the county committee, as provided in Rule X., for the first Monday of April, 1898; he was a candidate for re-election as chairman. The bill filed the Thursday before the meeting averred that in a large number, 258, of the districts announced as vacant, no duly elected committeeman had been certified; that Howley, in violation of the rules, had already filled vacancies with names of persons not elected, and was about to complete the roll with names of others appointed by himself; further, that he had erased from the roll the names of duly elected members, and was about to wrongfully appoint others. The prayer of the bill was that Howley be restrained by injunction from erasing names, and that he be enjoined from filling vacancies, or in any way tampering with or interfering with the roll. The defendants made no answer, but contented themselves with denying

delegations in political conventions. The voters themselves are competent to deal with such matters without the guiding hand of the chancellor, and it will make for their independence, self reliance and ability for self government, to permit them to do so. It is true, they may make mistakes, but courts themselves have been known to err."

[1] The statement of facts, arguments of counsel, and that portion of the opinion which discusses the evidence are omitted.

the jurisdiction of the court. After hearing testimony, the learned judge of the court below found the material facts averred by plaintiff to be true, and as a conclusion of law that the court had jurisdiction to entertain the bill and grant relief; therefore, he entered a decree restraining the defendants or either of them from adding names to the roll upon any pretence, or striking therefrom names, and annexed to the decree a roll of those whose names should properly appear thereon. Thereupon defendants bring this appeal and assign for error want of jurisdiction in the court. . . . The question here is, has a court of equity jurisdiction at the instance of dissatisfied members of the party or committee to correct and make up the roll, and force warring democrats to associate with each other, when they are averse to such associations.

It is clear to us that no property right in plaintiffs or in others as members of the county committee existed. As a purely political committee it neither owned nor pretended to own or to derive any benefit from anything of value held by them in common. That money for legitimate election expenses was contributed by democrats to the committee, and by the members paid out, gave the one who handled the share put in his possession no personal ownership in it. He could derive honestly no personal benefit from the fund, and consequently had no property right. Such a duty would be a very "dry trust," if honestly executed. But the learned judge of the court below was of opinion that, even if membership of the committee conferred no property right, nevertheless, under the act of June 16, 1836, which confers on the common pleas the jurisdiction and powers of a court of chancery in "The supervision and control of all corporations, other than those of a municipal character and unincorporated societies or associations and partnerships," he had jurisdiction to entertain the bill and found thereon his decree. We have more than once decided that this act gives to the courts only the powers of the English court of chancery. See *Kneedler* v. *Lane*, 3 Grant, 523, where Justice STRONG fully and clearly construes the act, and so pronounces. The English chancellor has always disclaimed authority to interfere with the action of voluntary and unincorporated associations where no right of property was involved: *Rigby* v. *Connol*, L. R. 14 Ch. Div. 482. We will not cumber this opinion with further citations from the English reports to sustain this view, for it is scarcely questioned by counsel for appellee. The court below we think was misled into claiming for the courts of Pennsylvania enlarged chancery powers, because of the tendency of our late legislation to regulate primary elections and prevent fraud and corruption by the election officers. It may be, if this bill had aimed to prevent a threatened violation of law by any of these officers, it could have been maintained. But there is no statutory injunction or prohibition directed to chairmen and secretaries of county committees; they are amenable alone to their party, which is purely political. The authority of the courts in such a case is thoroughly discussed by the New York court of appeals in *McKane* v. *Adams*, 123

N. Y. 609. In that case McKane filed a bill to enjoin the democratic committee of Kings county from denying his membership. The court dismissed it, saying in the course of an elaborate opinion: "His status therefore is that, though his town association elected him as a delegate to the general committee of the county organization, the members of that body have refused to admit him to association with them in their office. And if they would and will not associate with him, upon what reasoning or principle should they be compelled to, and the aid of a court of justice invoked? The right to be a member is not conferred by any statute; nor is it derivable as in the case of an incorporate body. It is by reason of the action and of the assent of members of the voluntary association that one becomes associated with them in the common undertaking, and not by any outside agency or by the individual's action. Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member or to confirm his election, he was remediless against that refusal. No rights of property or of person were affected, and no rights of citizenship were infringed upon."

We adopt this language as expressing our opinion in this case, without referring to and citing the many cases to which counsel on both sides have called our attention, for none of them is of such authority as to move us from our previous decisions. The constitution and statutes of the Commonwealth guarantee to all citizens the right of self-government by protecting them in the exercise of the elective franchise for all officers voted for at state and local elections; and lately, the law has gone further, and has so far recognized political parties as to pass an act prescribing the duties of officers at primary elections, and imposing severe penalties for misconduct. But beyond this, political parties and party government are unknown to the law; they must govern themselves by party law. The courts cannot step in to compose party wrangles, or to settle factional strife. If they attempt it, it may well be doubted whether they would have much time for anything else.

We reverse the decree and direct that the bill be dismissed at costs of appellee.